

S. HRG. 106-1067

**PROTECTING OUR SILENT VICTIMS: THE UNBORN
VICTIMS OF VIOLENCE ACT**

HEARING
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

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PROTECTING OUR SILENT VICTIMS: THE UNBORN VICTIMS OF VIOLENCE ACT

WEDNESDAY, FEBRUARY 23, 2000

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators DeWine, Leahy, and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Well, if we can begin, we are happy to welcome you all here to the Judiciary Committee this morning to consider the Unborn Victims of Violence Act, S. 1673. I welcome you all here this morning to this very important hearing on this very important legislation, the Unborn Victims of Violence Act.

I want to begin by thanking my colleague, Senator DeWine, for his leadership on this issue, and I appreciate that Senator DeWine has a particular interest in this legislation because of his own State of Ohio's history on this matter. But this is clearly an issue that is or ought to be compelling to all of us.

In my own home State of Utah, if a criminal assaults or kills a woman who is pregnant and thereby causes death or injury to the unborn child, the criminal faces the possibility of being prosecuted for having taken or injured that unborn life. Twenty-three additional States have similar laws on the books. Eleven of these States recognize the unborn child as a victim throughout the period of their prenatal development. This is only proper. It seems to me this is only just.

But under existing Federal criminal statutes, if a criminal assaults or kills a woman who is pregnant and thereby causes death or injury to that unborn child, the criminal faces no consequences in our Federal criminal justice system for taking or injuring that unborn life. This is wrong and it is not justified.

The bill we hear testimony on today simply seeks to address this disparity in the law by making it a separate Federal offense to kill or injure an unborn child during the commission of certain already defined Federal crimes committed against the unborn child's mother.

I cannot imagine why anyone would oppose this bill. The only reason for opposition that I can suppose is that some in the pro-choice movement believe that our bill draws attention to the effort

to dehumanize, desensitize, and depersonalize the unborn child. Given the political and legal arguments of abortion supporters, it may be difficult for them to concede an unborn child is human and therefore a victim of a crime.

Nevertheless, it is not our intention to turn this into a battle about abortion. In no way does this bill interfere with the ability of a woman to have an abortion under current law. It does not permit the prosecution for any abortion to which a woman consents. It does not permit the prosecution of the woman for any action, legal or illegal, in regard to her unborn child. In my view, we should all be able to support this modest effort to protect mothers and their unborn children.

I want to welcome our impressive group of witnesses to the hearing this morning. In particular, I would like thank all of those witnesses on our second panel. Their personal experiences will do much, I think, to inform our debate on this legislation.

Finally, before turning to our ranking member and then to Senator DeWine, I feel it necessary just to comment briefly on one aspect of the debate on this legislation. As I understand it, at least during the House's consideration of this legislation, one of the arguments of opponents was that this bill would somehow weaken our efforts against domestic violence by diverting the attention of the legal system away from domestic violence or other violence against women and directing the focus onto the unborn.

With all due respect, I find this argument truly disingenuous. For more than 10 years now, I have worked on the issue of domestic violence and violence against women, and led the fight, along with Senator Biden, to enact landmark legislation on this issue. I have fought year after year for funding of programs to help women who are the victims of violence and even publicly called attention to the fact that, notwithstanding their rhetoric, this administration was not doing enough to prosecute crimes under the Violence Against Women Act. I do not accept the ridiculous argument that mothers are going to be hurt or less protected by the strengthening of laws to protect their unborn children.

Now, having said that, Senator Feinstein is here, so we will turn to Senator Feinstein to make a statement on behalf of the minority.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and welcome back. I am delighted to have you back and look forward to working with you in the future.

The CHAIRMAN. Thank you.

Senator FEINSTEIN. Mr. Chairman, I was delighted by what you said that this bill really has nothing to do with the right of a woman to control her own reproductive system, but really has to do with someone who assaults and/or murders a woman and then also assaults and possibly kills her unborn child. It might be useful for me to discuss a bit how California has dealt with this issue and what might have been learned from that experience.

In 1969, a man named Robert Keeler savagely and cowardly attacked his divorced wife, Teresa, in Amador County. That is about 100 miles from my home in San Francisco. Teresa Keeler was 7

months pregnant. Vowing to kill her unborn child, Robert Keeler stomped repeatedly on Teresa's stomach, fracturing the head of the unborn child.

The California Supreme Court then ruled that Robert Keeler's killing of Teresa's unborn child was not murder because under State law murder was the unlawful killing of a human being and a fetus was not a human being. Soon after, rightly outraged at Keeler's escape from justice, the California Legislature amended the California murder statute to permit murder prosecutions for killing a fetus. That was 3 years before *Roe v. Wade*. It was also similar to what the proposed bill does. It gives the fetus an independent status. Both California law and the proposed bill, as I understand it, permit a prosecutor to bring two counts against a defendant who attacks a woman, killing her unborn child, one for assault and one for murder.

Twenty-two years after Keeler attacked his ex-wife, a San Diego resident named Maria Flores was cashing a check when a stranger, Robert Davis, approached her, pulled a gun and demanded money. Clutching her 20-month-old son, Flores refused to hand over her money. Davis shot her in the chest.

While Flores survived the shooting, her almost 6-month-old unborn child did not. He was stillborn. Under California's murder statute, Davis was sentenced to life without possibility of parole for murder of this unborn child. On appeal, however, Davis raised the question of whether he could be convicted of murdering a non-viable fetus. The California Supreme Court said yes, specifically that the State murder statute, including capital murder, protected any fetus progressing beyond the embryonic stage of 7 to 8 weeks. This interpretation is again similar to the proposed bill, except that the proposed bill covers all prenatal stages rather than just the last 28 or 29 weeks. And the proposed bill explicitly prohibits the death penalty for feticide, while California law does not.

The *Davis* decision was front-page news in California because it was seen as deciding the moral issue of when life begins. Anti-abortion activists, for example, applauded the *Davis* decision, right or wrongly, as holding that embryos were persons, thus contradicting *Roe v. Wade*.

One anti-abortion activist was quoted in the Los Angeles Times as saying of the opinion, "This is a victory of sorts because it is giving the identity of humanity to an unborn child." Another activist noted that the decision, "points out the absurdity of the position that mommy can kill the fetus, but nobody else can."

I don't wish to quarrel with the California Supreme Court's decision in the *Davis* case. It was based on the court's understanding of the intent of the California Legislature in 1970, 3 years before *Roe v. Wade*. Rather, I wish to suggest that we in Congress can learn from the controversy surrounding that decision. The lesson of *Davis* is clear: protect pregnant women from criminals without injecting abortion politics into the criminal code. And I think that is extraordinarily important in this decision today.

It is unclear to me, frankly, how much this proposed bill really does inject abortion politics into the criminal law. In my view, at least at this time—and I hope to hear the testimony; after all, a hearing is for the purpose of giving us the opportunity to learn by

hearing various witnesses. But I would like to ask some of these witnesses whether an alternative that would accomplish the same end as the Unborn Victims of Violence Act but might be able to do so in a way that would not erode the foundations of a woman's constitutional right to choose might not be a better way of going.

The alternative I would propose is simple, and that is to enhance the sentence of any defendant who interrupts or terminates a woman's pregnancy in the course of another Federal crime. This alternative would keep those criminals who kill pregnant women in jail for a long, long time. It also keeps the focus on the woman, but it also makes the point that whether one chooses to call an unborn child a fetus or whether you choose to call it an unborn child, you also create an enhanced penalty for that child as well.

In looking at this alternative, I am somewhat influenced by how this issue has been treated by my own State of California. Now, California was one of the first States to depart from the old common law rule this country inherited from England that a child had to be born alive for homicide laws to apply. So I would be very interested in hearing the testimony.

Let me just point out one thing. A bill that I authored in 1994 which we base this on was the Hate Crimes Enhancement Act, and this was passed into law. Senator Kennedy has legislation to toughen that even more. But my legislation essentially provided that if an individual committed a felony—and this, of course, was either in pursuance of a federally protected right or on federally protected land—and that person committed the felony as a product of hate based on one's race, creed, or color, then there was a bifurcated trial. And if you could prove the felony, then you could also prove the hate and the sentence was doubled. So this, in a sense, provides the precedent for my thinking that the way to go is to provide an enhanced sentence based on that earlier legislation.

I thank the Chair.

The CHAIRMAN. Well, thank you, Senator.

If we could first go to Senator Leahy, who may have an opening statement, then we will turn to the author of the bill, Senator DeWine.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. I do, Mr. Chairman, and I apologize for being late. I had a doctor's appointment which went longer than I thought, but I am always glad to be here with both of you.

I am so glad to see Ms. Acheson here. I know that this has been a time of some stress for her and her family, and I am glad that you could take this time. It means a lot to the committee.

Acts of violence are abhorrent, but they are especially disturbing when they are committed against pregnant women. When a violent crime causes injury to a pregnant woman that results in a miscarriage or other damage to the fetus, we all have the same desire to ensure that our criminal justice system responds decisively and firmly to exact appropriate punishment.

This is not an issue on which we will find any disagreement among Members of Congress, no matter their party affiliation or whether they are pro-choice or anti-abortion. Protecting pregnant

women and our families from violence is a serious and compelling problem that deserves to be elevated above political agendas or partisan politics.

Today, we are going to hear about a bill that proposes a new Federal crime to punish conduct that violates a list of over 60 existing Federal crimes that are already on the books and causes the death of or bodily injury to a child who is in utero. The terms “a child who is in utero” and “unborn child” are defined in this proposal to be “a member of the species *Homo sapiens* at any stage of development.”

Now, through this proposal, we will be forced to revisit the divisive political debate about when human life begins and what is meant by these definitions, whether “any stage of development” is intended to cover an unfertilized human egg, or zygote, and how far away from viability the proposal is designed to move the Federal definition of a “person.”

Generally, our Federal and State criminal laws only penalize conduct that affects a person already born alive. That does not mean we cannot or should not go further. If a violent crime against a pregnant woman causes her to miscarry or otherwise injures the fetus, I would support additional punishment.

Indeed, as Professor Peter Rubin states in his written testimony for this hearing, this is one area in which both sides of the debate about abortion might be able to find a common ground in supporting a properly worded statute that might give additional protection to women and families from this unique class of injury. While no other Federal criminal statute identifies the fetus as a distinct victim of crime, this does not mean a fetus is left unprotected under our criminal laws.

The Justice Department pointed out the obvious in a letter dated September 9, 1999, to Chairman Hyde of the other body that, “Because the criminal conduct that would be addressed is already the subject of Federal law, since any assault on the unborn child cannot occur without an assault on the pregnant woman, the bill would not provide for the prosecution of any additional criminals.”

As Ronald Weich, a former prosecutor and special counsel to the Sentencing Commission, notes in his testimony, defendants whose violent attacks against pregnant women resulted in harm to a fetus have been prosecuted, and thus it is very clear that criminal liability may be imposed under current Federal law.

The Federal Sentencing Guidelines already provide a sentencing enhancement of two levels—in other words, an increased sentence—where the defendant knew or should have known that the victim was a vulnerable victim, which is defined as somebody who is unusually vulnerable due to age or physical or mental condition. That provision has been used to cover violent crimes against pregnant women. Mr. Weich describes several cases in which a pregnant woman was treated as a vulnerable victim, resulting in enhancements—that is, greater sentences—in the applicable Guidelines sentencing ranges for the defendants.

Now, there are a number of other ways we should consider to protect pregnant women and their families that would enjoy strong bipartisan support. It seems to me—and I don’t think necessarily this was the intent of the legislation, but the bill has not been

crafted to find that common ground. Nor do I believe it is designed to provide effective means to prosecute or prevent violence against pregnant women.

First, the bill unnecessarily injects the abortion debate into our national struggle against violence toward women. The Supreme Court in *Roe v. Wade* held that the word “person” as used in the 14th Amendment does not include the unborn.

Second, the National Coalition Against Domestic Violence has warned that a consequence of the bill is that battered women who are financially or emotionally reliant on the batterer may be less likely to seek appropriate medical attention if doing so could result in the prosecution of the batterer for an offense as serious as murder. We ought to listen to these people who have this experience.

Finally, the bill ignores the problems of domestic violence, sexual assault, and other forms of violence against women, and, in fact, does not even mention violence against women. It ignores the fact that an attack that harms a pregnancy is inherently an attack against a woman.

Five years ago, we made great strides in the fight against domestic violence by passing the bipartisan Violence Against Women Act. Senators Biden and Hatch, in particular, both contributed considerable effort in achieving this. The Department of Justice has brought close to 200 Violence Against Women Act and Violence Against Women Act-related indictments. They have awarded over \$700 million in grants to communities to help combat violence against women. In fact, Vermont was the first State in the country to apply for and receive funding under it.

I will put my whole statement in the record, but what I wish we would do is look at the fact that the Violence Against Women Act needs reauthorization. If we really want to affect violence against women, let’s reauthorize that Act and keep these programs working.

I will put my whole statement in the record, Mr. Chairman.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR LEAHY

Acts of violence against women are abhorrent but they are especially disturbing when committed against pregnant women. When a violent crime causes injury to a pregnant woman that results in a miscarriage or other damage to the fetus, we all share the desire to ensure that our criminal justice system responds decisively and firmly to exact appropriate punishment. This is not an issue on which you will find any disagreement among Members of Congress, no matter their party affiliation or whether they are pro-choice or anti-abortion. Protecting pregnant women and our families from violence is a serious and compelling problem that deserves to be elevated above political agendas and partisan politics.

Today we will hear about a bill that proposes a new federal crime to punish conduct that violates a list of over 60 existing federal crimes and “causes the death of, or bodily injury to a child, who is in utero.” The terms “a child, who is in utero” and “unborn child” are defined in this proposal to be “a member of the species homo sapiens, at any stage of development.” Through this proposal we will be forced to revisit the divisive political debate about when human life begins and what is meant by these definitions—whether “any stage of development” is intended to cover an unfertilized human egg or a zygote and how far away from viability the proposal is designed to move the federal definition of person.

Generally, our federal and state criminal laws only penalize conduct that affects a person already born alive. That does not mean we can not or should not go further. If a violent crime against a pregnant woman causes her to miscarry or otherwise injures the fetus, I would support additional punishment. Indeed, as Professor Peter Rubin states in his written testimony for this hearing, “this is one area on

which both sides of the debate about abortion might be able to find common ground in supporting a properly worded statute that might give additional protection to women and their families from this unique class of injury.”

While no other federal criminal statute identifies a fetus as a distinct victim of crime, this does not mean a fetus is left unprotected under our criminal laws. The Justice Department has pointed out the obvious, in a letter dated September 9, 1999, to Chairman Hyde, that “[b]ecause the criminal conduct that would be addressed . . . is already the subject of federal law (since any assault of an ‘unborn child’ cannot occur without an assault on the pregnant woman), [the bill] would not provide for the prosecution of any additional criminals.” As Ronald Weich, a former prosecutor and Special Counsel to the Sentencing Commission, notes in his testimony, defendants whose violent attacks against pregnant women resulted in harm to a fetus have been prosecuted, and thus “it is very clear that criminal liability may be imposed under current federal law.”

Moreover, the federal Sentencing Guidelines already provide a sentencing enhancement of two levels where the defendant knew or should have known that the victim was a “vulnerable victim,” which is defined as someone who is unusually vulnerable due to age, physical or mental condition. Guidelines Manual, §3A1.1(b)(1). This provision has been used to cover violent crimes against pregnant women. Mr. Weich describes several cases in which a pregnant woman was treated as a vulnerable victim, resulting in enhancements and upward departures in the applicable guideline sentencing ranges for the defendants. Nevertheless, if there is any question about application of these enhancements in violent crimes against pregnant women, we should clarify that matter promptly.

There are a number of other ways we could consider to protect pregnant women and their families that would enjoy strong bipartisan support. Respectfully, it seems to me that this bill has not been crafted to find that common ground, nor designed to provide any effective means to prosecute or prevent violence against pregnant women.

First, this bill unnecessarily injects the abortion debate into our national struggle against violence towards women. The Supreme Court in *Roe v. Wade* held that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” This bill purposely employs terms designed to undermine a woman’s right to choose by recognizing for the first time in federal law the legal rights of a person as applied to the earliest stages of development of a fetus, an embryo or an egg.

Second, the National Coalition Against Domestic Violence has warned that a consequence of the bill is that battered women, who are financially or emotionally reliant on the batterer, may be less likely to seek appropriate medical attention of doing so could result in the prosecution of the batterer for an offense as serious as murder. We should pay attention to the experts about the consequences of legislative proposals, such as this one, particularly when the experts say this bill could have devastating effects for victims of domestic violence.

Finally, the bill ignores the problems of domestic violence, sexual assault and other forms of violence against women and, in fact, does not even mention violence against women. In short, this bill ignores the reality that an attack that harms a pregnancy is inherently an attack on a woman.

Congress has responded aggressively in the past to address the problem of violence against women. Five years ago, Congress made great strides in the fight against domestic violence by passing the bipartisan Violence Against Women Act as a part of the 1994 Violent Crime Control and Law Enforcement Act. Senator Biden and Senator Hatch, in particular, both contributed considerable effort and leadership in achieving the passage of VAWA, which marked a turning point in our nation’s effort to address domestic violence and sexual assault.

This landmark legislation created federal domestic violence offenses with severe penalties to hold offenders accountable for their destructive and criminal acts of violence. The Department of Justice has brought close to 200 VAWA and VAWA-related indictments and awarded over \$700 million in VAWA grants to communities working hard to combat violence against women and help deal with the pain and suffering that exists when it occurs.

I am proud to say that Vermont was the first State in the country to apply for and receive funding under VAWA, and I have seen the way in which groups such as the Vermont Network Against Domestic Violence and Sexual Assault have worked effectively to stem the violence against women and children and help those who have suffered from it.

We need to discuss the reauthorization and improvement of grant programs under the Violence Against Women Act. These programs are due to expire at the end of this fiscal year. The expiring grant programs that would be reauthorized and improved by VAWA II include the National Domestic Abuse Hotline, the Civil Legal

Assistance Grant Program, STOP Grants, Grants to Encourage Arrest Policies, Rural Domestic Violence and Child Abuse Enforcement Grants, National Stalker and Domestic Violence Reduction grants, the Family Violence Prevention and Services Grants, Grants for televised testimony for Victims of Child Abuse, Child Abuse Training Programs for Judicial Personnel and Practitioners, and the Court-appointed Special Advocate program for victims of Child Abuse.

Reauthorizing VAWA, which is under attack, is not the subject of the Committee's hearing today. For those of us who want to prevent violence against women, including pregnant women and their families, the failure of this Committee and the majority to consider reauthorization of that important law and instead to focus on a measure designed to be divisive is doubly unfortunate.

We know that violence against women pervades all areas of our country. It makes no difference if you are from a big city or a rural town; domestic violence and other violence against women can be found anywhere. This is a serious issue. We owe this country a serious response, *not* debate on ideological proposals that ignore effective programs designed to help women crime victims and that potentially undermine their constitutional rights.

The CHAIRMAN. Well, thank you, Senator Leahy. The Biden-Hatch Violence Against Women Act will be brought up, and we are going to do everything we can to pass it this year and reauthorize it again this year.

Let's turn to the author of the legislation, Senator DeWine.

**STATEMENT OF HON. MIKE DeWINE, A U.S. SENATOR FROM
THE STATE OF OHIO**

Senator DeWINE. Mr. Chairman, thank you very much. Let me thank you for holding this very important hearing this morning on the Unborn Victims of Violence Act.

I would like to thank our witnesses, Shiwona Pace, from Arkansas; William Croston, from North Carolina; and Joseph Daly, from my home State of Ohio. I want to thank them for appearing here today and for providing their very personal testimony on this very sad and important topic.

Tragically, Mr. Chairman, unborn babies, perhaps more than we realize, are, in fact, the targets of violent acts. Right now, Federal law currently only criminalizes crimes against born humans. There are no separate Federal provisions in the law to protect silent, unborn victims of violence.

Mr. Chairman, this is wrong. It is wrong that our Federal Government does absolutely nothing to criminalize violent acts against unborn children. It is wrong that our Federal Government is letting people who willfully injure pregnant women to get away with these violent acts, sometimes even murder.

Today, our witnesses will give us horrible, graphic examples of violence against innocent unborn children. In my own home State of Ohio, an incident occurred in 1996 when Airman Gregory Robbins, who was stationed at the time at Wright-Patterson Air Force Base near Dayton, beat his 8-month-pregnant wife in a fit of rage. Fortunately, Ms. Robbins survived the violent assault. Tragically, however, her uterus ruptured during the attack, causing the death of her baby, a little baby whom she had named Jasmine.

Mr. Chairman, we must correct the Federal law to ensure that criminals don't get away with violent acts without being adequately punished. That is why we have introduced the Unborn Victims of Violence Act. It would hold criminals liable for causing harm or death to an unborn child during the commission of certain violent, specified Federal crimes. In such cases, the assailant could be

charged with a second offense committed against the unborn child. The single attack affecting both victims would be treated as two separate crimes under the Federal Code and also under the Uniform Code of Military Justice.

Now, I know, Mr. Chairman, some people oppose this legislation or have raised issues about this legislation based on constitutional concerns. And I understand these, but I believe they are unfounded. At least 24 States already have criminalized harm to unborn victims. Another seven States criminalize the unwanted termination of pregnancy. Eleven of these States provide protection of the unborn child throughout the period of in utero development.

Now, Mr. Chairman, despite this wide range of legislation, no State supreme court has held that any of these statutes violate our Constitution. In fact, the Supreme Court of Minnesota specifically held that *Roe v. Wade*, "does not grant a unilateral third-party right to destroy a fetus." We will today, Mr. Chairman, explore these constitutional issues, but I am confident that our bill does not create any constitutional problems.

Some have expressed the concern that this bill is an effort to address the issue of abortion. Mr. Chairman, that is not the case. In fact, we purposefully drafted this legislation very narrowly to avoid this issue. For example, the bill does not provide for prosecution for any abortion to which a woman consented. It does not provide for the prosecution of a woman for any action, legal or illegal, in regard to her unborn child.

This legislation does not provide for prosecution for harm caused to the mother or unborn child in the course of medical treatment. Finally, the bill would not allow for the imposition of the death penalty under this Act. Similar legislation in a number of States has had little impact on abortion rights, and neither will our bill.

Mr. Chairman, some people would like to side-step this issue by maintaining the current system. Rather than recognizing the unborn child as a victim, they would just as soon enhance the penalty for harming the mother. But any of our witnesses will tell you that their unborn children weren't just part of the mother; they were a part of the whole family. And they should be recognized by more than just Sentencing Guidelines enhancements. They must be recognized, Mr. Chairman, as what they truly are, victims of crime.

In closing, Mr. Chairman, let me say that I have been fighting crime and fighting for children for more than a quarter of a century, as have all of the members of this panel. And I have learned a lot of lessons in that period of time. I have learned that we must be ever-vigilant to protect our most vulnerable victims in society, particularly those silent victims who cannot speak for themselves. That is why I wrote and am sponsoring the Unborn Victims of Violence Act to speak on behalf of unborn children and on behalf of their families who are, in fact, the true victims of violence.

Mr. Chairman, those who violently attack unborn babies are criminals. We have an obligation as a society to these unborn children and to their families to ensure that the Federal penalty does, in fact, fit the crime.

I thank the Chair and I look forward to the testimony of all the witnesses.

The CHAIRMAN. Well, thank you, Senator.

I am advised that Congressman Graham has been delayed and will hopefully be arriving shortly after 11 a.m. So we are going to proceed with our panels. Now, I have another commitment and will therefore leave chairing the hearing in a little while to Senator DeWine.

Before I leave, however, let me just say a special thanks to the witnesses on panel three. I imagine it is not easy for some or all of you to come here and share your tragic experiences, but indeed you are performing a service and I want to thank all of you for that. I plan on reading your testimony, along with that of all the other witnesses. So I want to thank Ms. Pace, Mr. Croston, and Mr. Daly.

Also, another one of today's witnesses, Ron Weich, is familiar to all of us on the committee. He worked for Senator Kennedy for several years. I want to congratulate you, Ron, and your wife, Julie, on the birth of your first child, Sophie. So we are happy to have you here as well.

We are also very pleased to have the Justice Department represented by the Honorable Eleanor D. Acheson. We look forward to taking your testimony, Ms. Acheson, and knowing what the Justice Department's position is on this matter, and so we will take your testimony at this time. And we will look forward to having the Congressman from South Carolina brought up as soon as he gets here.

STATEMENT OF ELEANOR D. ACHESON, ASSISTANT ATTORNEY GENERAL, OFFICE OF POLICY DEVELOPMENT, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. ACHESON. Thank you, Mr. Chairman, and if it is appropriate, when Congressman Graham arrives, I am happy to suspend and have him proceed and then I can finish up. Whatever suits the committee and his schedule.

I am pleased to be here this morning to present the position of the Department of Justice on the proposed Unborn Victims of Violence Act, S. 1673. S. 1673 would amend the Criminal Code and the Uniform Code of Military Justice to make it a separate Federal offense to cause death or bodily injury to a child in utero in the course of committing any one of 68 enumerated Federal offenses. It would penalize harm to the unborn at any stage of development, and would so on a strict liability basis because the perpetrator does not have to know or even suspect that the adult woman he harms is pregnant. The punishment for this new offense is the same as if the perpetrator had harmed the pregnant woman, except the death penalty is not permitted.

Halting violence against all women, including pregnant women, has been a top priority of this administration for the past 7 years. In 1994, the administration, with the bipartisan support of Congress and the support of the President, made the Violence Against Women Act, VAWA, the law of the land.

VAWA for the first time created Federal domestic violence offenses with strong penalties to supplement State and local efforts to hold violent offenders accountable. To date, the Justice Department has complemented State and local prosecutions by filing over

200 VAWA and VAWA-related indictments, and this number continues to grow.

In addition, the Department alone has awarded well over \$800 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence, sexual assault, and stalking. These funds have made a difference in women's lives and in how communities respond to violence against women.

We agree with the sponsors of S. 1673 that the Federal Government can and should play an important role in the campaign to end violence against women. But S. 1673 is, in our view, a flawed Federal response to such violence. It is also one that has several troubling collateral consequences.

Our first concern is that this legislation reaches only pregnant women, and then only if they happen already to be protected or fall within the activities of one of the 68 enumerated Federal offenses listed in S. 1673. Because it penalizes harm only to a subset of women, this legislation is a less effective means of combatting violence against all women.

Second, the bill expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes the potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, for example, if a police officer uses a slight amount of excessive force to subdue a female suspect without knowing or having any reason to know or believe that the individual was pregnant and the individual later miscarried, the officer could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for which such use of force on a non-pregnant woman might be ten years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evinced by the defendant's mental state.

We strongly object to this aspect of S. 1673 which strikes us as sort of a Russian roulette because the person who harms a woman may receive a dramatically increased sentence—in some cases the sentence would be as little as a year—and because of a pregnancy that the perpetrator did not know or have any reason to believe or to be aware of. It could increase to life imprisonment whenever the woman he harmed happens to be pregnant and miscarried even if he had no way of knowing of the pregnancy.

While strict liability-type enhancements are not unheard of in American criminal law—the felony murder rule is one, for example—criminal liability for such crimes is almost always tied to culpability and is limited to the legal consequences that the wrongdoer can reasonably foresee. That is why the felony murder rule is limited to the subclass of felonies from death may reasonably occur—arson, escape, murder, kidnapping, burglary, to name a few.

S. 1673's new crime, by contrast, has no such limitation and applies to a range of crimes for which harm to the unborn is not necessarily foreseeable, such as damaging religious property or animal enterprise terrorism. This infirmity might be overlooked if the legislation's new crime required that an offender know or have reason to suspect that the female victim is pregnant.

But S. 1673 expressly disavows any such requirement. And by automatically equating harm to the unborn with harm to the pregnant woman, the legislation replaces judicial discretion in sentencing with mandatory and substantial increases in sentencing without regard to individual culpability.

In addition to having these broader policy defects, S. 1673 is also likely to be ineffective as a practical matter because it cannot be used to prosecute any persons who are not already subject to Federal prosecution, since a person violates S. 1673's new crime only if he or she first engages in conduct that violates one of the 68 specifically enumerated Federal crimes.

The legislation may also be counterproductive to Federal efforts to stop domestic violence. S. 1673 does not require the Government to first obtain a conviction, or for that matter even prosecute an offender for harming the pregnant woman before proceeding under the new crime created by the legislation.

Because the penalties for harming the unborn under S. 1673 will often be greater than the penalties for harming the pregnant woman, S. 1673 may actually reduce the number of prosecutions brought for injury to the pregnant woman because prosecutors are likely to devote most, if not all, of their energies to securing convictions under S. 1673 due to its higher potential sentences.

S. 1673 may also be unconstitutional in some of its applications. The drafters were careful to recognize that abortion-related conduct is constitutionally protected under *Roe v. Wade* and *Planned Parenthood v. Casey*. The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent is implied by law in a medical emergency.

Including the exception does not, however, remove all doubt about the bill's constitutionality because the bill's exception for abortion-related conduct does not on its face encompass situations in which consent to an abortion may be implied by law if, for example, the pregnant woman is incapacitated, even though there is no medical emergency.

Most troubling, however, is the fact that S. 1673 may gratuitously and, in our view, unnecessarily plunge the Federal Government into one of the most difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues. The bill's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of Federal statute. Moreover, such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women.

Other more effective means of Federal intervention to stop domestic violence and other violence against women currently exist. If the progress of the last 5 years is any harbinger of the potential for success, reauthorizing VAWA is a straightforward and effective way to diminish violence against women. Moreover, there are other available avenues that are better tailored than S. 1673 to addressing the additional harm a pregnant woman suffers when her fetus is injured.

We are willing to work with Congress to strengthen the criminal provisions of VAWA and to develop alternative legislation to

strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant.

For all of these reasons, the administration strongly opposes S. 1673, and the President's senior advisers would recommend that he veto the bill were it presented to him. Instead, we urge the Senate to support the reauthorization of VAWA as a more direct and effective way to combat violence against women and violence against the unborn.

Thank you for the opportunity to testify on the legislation. I would be happy to answer any questions.

The CHAIRMAN. Well, thank you. I have to say as one of the authors of the Violence Against Women Act, I am a little bit disappointed by the Department's position. We received your testimony just before the hearing today, but I had previously reviewed the Department's letter to the House raising objections to the counterpart House bill.

First, that response seems to suggest that the Department might have some difficulty with a substantial increase in sentences contemplated by our bill, but that some additional punishment may be warranted. Can you explain that to me? Is, "some," increase in punishment acceptable to you, but just not a substantial increase?

Ms. ACHESON. Mr. Chairman, if I may make two points, I think that our basic concern with this legislation is that it creates this independent right and implicates the issues that I alluded to toward the end of my testimony, we believe, unnecessarily.

The reason that we would favor a sentencing enhancement is because we think the enhancement, or a bill that provided for an enhancement could reasonably—and I know it could be worked out—cover a multitude of circumstances and could provide a sort of continuum of enhancement or substantial increases to the sentence to respond to the individual facts of the individual circumstances of the particular crime and the events that occurred in connection with it.

What we would like to see is an enhancement that gave to a judge—and whether this would come from a direction from the Congress to the Sentencing Commission—but gave to the judge the ability to make a determination over a scope of an enhancement based on the facts addressing some of the issues that we pointed out that are not addressed by the bill; namely, was there an intent factor here. And that, it would seem to me, would call for a very, very substantial—not just some, but a substantial enhancement.

If there was no intent but there was knowledge or reason to know that the woman who was the victim was pregnant, and what were the circumstances on that, that might call for another level. If, in fact, it was the police officer's scenario or some other situation where something happened and the individual who perpetrated the crime had no reason to know and did not know that the individual was pregnant, it might be a lower level.

But that is the approach that we would favor, something that would give the sentencing judge, after he or she had heard the trial, heard what was the basis of a plea agreement, to make a judgment about what was called for in those circumstances.

The CHAIRMAN. Well, the administration's views also note that, "Identification of a fetus as a separate and distinct victim of crime

is unprecedented as a matter of Federal statute." I guess I would have to agree to that, since if it were preceded we would not need to be passing new legislation.

But let me also point out that it is not unprecedented generally, as we all know, given the numerous State statutes which protect the unborn as this bill does. Now, isn't that true, Ms. Acheson?

Ms. ACHESON. Mr. Chairman, I think that everybody who has spoken has alluded to a State statute that does address this, and we don't disagree with the fact that there are State statutes that address this and they go at it in different ways.

The CHAIRMAN. Let me turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

We have seen some cases that were brought federally in order to charge the defendant with the death penalty even in States where the voters had rejected the death penalty. My State, for example, does not have the death penalty, but cases that could easily be brought under State law could also instead be brought under Federal law, where one would have the death penalty and the other would not. We saw a case recently like that. Eventually, the U.S. attorney in a plea agreement decided not to push for the death penalty in that case.

Now, I am concerned that the bill raises some questions on federalizing crime, something that we all speak against and then end up federalizing more crimes. For example, in Vermont the common law "born alive" rule applies in cases involving harm to a fetus.

If this bill were to become law, would we have situations where pressure would be brought on Federal prosecutors to bring cases federally so that the additional charge relating to harming a fetus may be made rather than leaving the case to the State prosecutors and courts?

Ms. ACHESON. I think that is a substantial risk.

Senator LEAHY. Now, on some hearings on the bill, I looked back through the transcripts and the House encountered an interesting hypothetical which is not out of the realm of possibility.

Let's assume the law is in place. A protestor at an abortion clinic pushes a pregnant woman. She falls down and as a result of the assault she miscarries. Now, would the protestor be criminally liable under this bill even if the pregnant woman was entering the clinic for an abortion? I don't know if you have an answer to that, but this was raised at the House hearing and I am just curious.

Ms. ACHESON. I mean, I am sure that if there are law professors in the room, they are probably writing this one down for their exam question.

Senator LEAHY. And I don't mean to ask for an answer, but you can see the—

Ms. ACHESON. Well, I think it raises, you know, very tough issues. Before you even get to the back end of the question, there are issues implicated in the beginning of it, which is let's assume she wasn't heading to the abortion clinic for an abortion, but she was doing something else there and either confronting the protestors or indeed with the protestors and some kind of a melee broke out. I think there are tough questions there, and there are very tough questions when you add the back end of the hypothetical.

Senator LEAHY. Well, let's address one that doesn't even get into this particular hypothetical but is a very real issue. The bill provides that a defendant may be convicted of the new crime of harming a fetus even if he does not know the victim was pregnant. Well, you have got a knowledge issue by itself, but let's go a little bit further.

Can the defendant be charged with the separate offense of causing death or bodily injury to a fetus if the pregnant victim herself did not know she was pregnant until after the assault?

Ms. ACHESON. The way the bill is written, I think the answer to that would probably be yes.

Senator LEAHY. So you could have a case where both the one committing the assault and the victim, neither one knowing the victim was pregnant.

Ms. ACHESON. It would appear that way.

Senator LEAHY. Now, if Congress passes this bill and if it is enacted, I think both supporters and opponents of the bill would accept the fact that we know there are going to be inevitable constitutional challenges, which kind of worries me because there are things we could do to protect pregnant women that would not have a constitutional problem, as I see it.

For example, do you see anything wrong constitutionally with clarifying that the current sentencing enhancements for vulnerable victims apply to pregnant women? In other words, if we were to say that under the Sentencing Guidelines you could have additional sentences if the harm was against a pregnant woman, the same way we do with victims elsewhere, do you see any constitutional problem with that?

Ms. ACHESON. I don't.

Senator LEAHY. So that if we were to do that instead of this law, we would be able in all likelihood to escape any constitutional issues?

Ms. ACHESON. That is certainly the take I have on it at the moment. It certainly seems to be very consistent with the other kinds of enhancements that are in the whole Sentencing Guidelines structure and it would seem to me it would be highly defensible.

Senator LEAHY. I raise these because I think that on this committee, as I said earlier, whether you are Republican or Democrat, or however you feel about abortion, I think one thing that unites us all is our strong revulsion toward violence against women, and we have all supported very strong penalties for that.

Senator DeWine and I are both former prosecutors. I think that we would be very united in our feeling about why such people should be prosecuted. Where the difference will come, of course, is what is the best thing to do about it.

Mr. Chairman, my time is up and I appreciate it.

Senator DEWINE [presiding]. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Ms. Acheson, I am leaning toward the thrust of some form of legislation which provides an enhancement, and I was happy to hear you say that your Department would support that. As I understand it, you said that you thought that the judge should be given latitude in determining the scope and determining whether there was

knowledge and intent. You did not necessarily say that the Department felt there had to be both present.

Did I understand that correctly?

Ms. ACHESON. Well, that is what I said, Senator Feinstein. Let me say that the Sentencing Commission itself, it seems to me, might well have views about how to structure this to make such an approach consistent with the guidance to judges in connection with other enhancement contexts.

You know, I was responding largely to Senator Hatch's question which I thought went to are we saying there should just be a little bit of an enhancement or more. And the point I was trying to make is I think it ought to be consistent with the way that our sentencing is done now under the whole Sentencing Guidelines structure. And whether that means that there is relatively prescriptive guidance given to judges, judges ought to be able to, with the guidance from the Congress or the Sentencing Commission, determine what the facts of the particular case call for.

And we do not feel there should just be in all cases necessarily just a little enhancement. In the situation that Senator DeWine described and others like that, there ought to be very significant enhancement. I mean, we all agree that there are potentially in those kinds of cases horrific circumstances.

Senator FEINSTEIN. There is a big difference between the man who assaults a woman with knowledge that she is pregnant and the course of the assault kills the child and somebody pushing a woman who is a week or 2 pregnant and she miscarries. I mean, how could you accuse that individual of murder? I think that would be very, very difficult.

And then it is even more difficult if you apply that test, as you seem to suggest in your written remarks, to the police officer who is trying to govern in a demonstration an unruly crowd and pushes a woman and she falls and is newly pregnant and miscarries. Then what does she do? I mean, does she bring a charge of murder against the police officer, and how does that sustain itself in terms of a trial? So I think there is such a radical spectrum here that when you look at the law, again you get into this question of viability and whether you really do kill a child or you kill the embryo, and whether it is advertent or inadvertent.

Let me ask just a couple of questions on transferred intent because I think this is an interesting question. Under the doctrine of transferred intent, a traditional rule of capital punishment, if A shoots a gun at B trying to kill him and accidentally kills C, a prosecutor can charge A with attempted murder of B and murder of C. A's intent to kill B is transferred to C. Similarly, a defendant's intent in attacking a pregnant woman can be transferred to her fetus or unborn child.

Why would you say that the doctrine of transferred intent would not apply here?

Ms. ACHESON. I would say that it doesn't apply here certainly in the context—two answers. In the context where the individual, the perpetrator, part or all of his or her motivation is to injure the fetus or terminate the pregnancy, there is no mistake. It is not a question of you are shooting at A, but you hit B or anything like that. So in those situations, it doesn't apply.

And in the situation where you don't know, it seems to me that the doctrine of transferred intent implies—this legislation sort of advances toward in its premise that you have got two human beings, people who are protected by the law. And it is easy to say, well, look at the doctrine of transferred intent. You know, you were shooting at A, but you hit B, and that is still murder.

That begs here one of the largest questions that is presented by this legislation. The law does not take the position, the Federal law doesn't and never has, that the fetus is, in fact, B. And so it just sort of tees up the largest question here, which is aren't we heading down the path to and equating a fetus, as I read this bill, from the moment of conception all the way through, to a person after birth.

And I guess what we are saying is you can sort of toss out the doctrine of transferred intent, but it just throws you right into the core issue here. Federal law has never done that. In the *Roe* opinion itself, the Supreme Court cautioned against going in that direction, and thought that there was no need to do that in that case and thought that at least judges shouldn't be doing it, which seems to me raises a question about whether anybody at the Federal level needs to be doing it and what I think we all agree should be accomplished, which is people at various levels of culpability should be punished for things, even if they didn't have knowledge about the loss or injury to a fetus, and if they did have knowledge at various stages can be achieved without getting into this huge and difficult question.

Senator FEINSTEIN. I think your testimony has been very helpful at least to me this morning because the cases that I think most of us are familiar with are really heinous cases. It is where there is a mature pregnancy and a man beats a woman and causes a death, as opposed to an unknown pregnancy, which is a very real phenomenon, and an advertent restraint in a legal form.

And some people would say, well, you are splitting hairs, but I really don't think so. So I very much like your suggestion or your view that the judge have authority to determine scope and really examine the question of knowledge and intent. So, again, to reiterate, we would very much like to work with you on working out an enhancement piece in this area.

Ms. ACHESON. We would be happy to do that. We would be glad to do that.

Senator FEINSTEIN. Thanks very much.

Senator DEWINE. Ms. Acheson, thank you very much for your testimony. We appreciate it very much.

Ms. ACHESON. That is it?

Senator DEWINE. You are done. Thank you.

Ms. ACHESON. Thank you, Senator.

[The prepared statement of Ms. Acheson follows:]

PREPARED STATEMENT OF ELEANOR D. ACHESON

Good morning. I appreciate the opportunity to appear before this Committee to express the Justice Department's views regarding the proposed Unborn Victims of Violence Act (S. 1673).

S. 1673 would amend the criminal code and the Uniform Code of Military Justice to make it a separate federal offense to cause "death or bodily injury" to a "child in utero" in the course of committing any one of 68 enumerated federal offenses

against a pregnant woman. The new crime created by S. 1673 has an expansive reach. The bill does not require that the perpetrator know, or even suspect, that the adult woman he harms is pregnant. The punishment for this new offense is the same as if the perpetrator had harmed the pregnant woman, except that the death penalty is not permitted.

Halting violence against *all* women, including pregnant women, has been a top priority of this Administration for the past seven years. In 1994, the Administration, with the bipartisan support of Congress and the support of the President, made the Violence Against Women Act (VAWA) the law of the land. VAWA marked a critical turning point in the national effort to address domestic violence, sexual assault, and stalking. VAWA, for the first time, created federal domestic violence offenses with strong penalties to supplement state and local efforts to hold violent offenders accountable. To date, the Department of Justice has complemented state and local prosecutions by filing over 200 VAWA and VAWA-related indictments, and this number continues to grow. In addition, the Department of Justice alone has awarded well over \$800 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence, sexual assault, and stalking. These funds have made a difference in women's lives, and in how communities respond to violence against women. Indeed, these funds have helped save the lives of many victims of domestic violence.

While we agree with the sponsors of S. 1673 that the federal government can and should play an important role in the campaign to end violence against women, S. 1673 is, in our view, a flawed federal response to the evils of such violence. It is, moreover, one that has several troubling collateral consequences. The Administration accordingly opposes this bill, and the President's senior advisors would recommend that he veto it.

Our first concern is that S. 1673 reaches only pregnant women, and then only if they happen already to be protected by one of the 68 enumerated federal offenses listed in S. 1673. Because it penalizes harm only to a subset of women, S. 1673 is a less effective means of combating violence against *all* women, and may have the side effect of devaluing the gravity of violence done to women not falling under S. 1673's auspices.

Second, the bill expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, for example, if a police officer uses a slight amount of excessive force to subdue a female suspect—without knowing or having any reason to believe that she was pregnant—and she later miscarries, the officer could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evinced by the defendant's mental state.

We strongly object to this "Russian roulette" aspect of S. 1673, which dramatically increases the penalty for harming a pregnant woman—in some cases, from as little as a year in jail to life imprisonment—based on the existence of an element, harm to the unborn, for which liability is strict. To be sure, strict liability enhancements are not unheard of in the American criminal law. The Federal felony-murder rule, for example, increases the punishment for homicides committed in the course of certain enumerated felonies.¹ Similarly, American tort law often holds a tortfeasor liable for injury no matter what the special sensitivities of the injured party. But in both situations, liability is usually tied to culpability and is limited to the legal consequences the wrongdoer can reasonably foresee. That is why the felony-murder rule is limited to the subclass of felonies from which a death is reasonably likely to occur—arson, escape, murder, kidnapping, burglary, to name a few. S. 1673's new crime, by contrast, has no such limitations and applies to a range of crimes for which harm to the unborn is not necessarily foreseeable, such as damaging religious property² or animal enterprise terrorism.³ This infirmity might be cured on a case-by-case basis if the crime were defined to require that an offender know, or have reason to suspect, that his female victim is pregnant, but S. 1673 goes out of its way to expressly disavow any such requirement. And by automatically and steadfastly equating harm to the unborn with harm to the pregnant woman, S. 1673 replaces judicial discretion in sentencing with mandatory and substantial increases in

¹ See 18 U.S.C. § 1111 (listing among first-degree murder "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery").

² 18 U.S.C. § 247.

³ 18 U.S.C. § 43.

sentencing without regard to individual culpability. In short, S. 1673's blunderbuss decoupling of punishment and culpability—combined with its heavy, mandatory increases in sentences that leaves little room for judicial discretion—is far too broad a brush to paint with in this arena.

In addition to having these broader policy defects, S. 1673 is also likely to be ineffective—if not counter-productive—as a practical matter. S. 1673 may be ineffective because it cannot be used to prosecute any persons who are not already subject to federal prosecution. Because one element of S. 1673's new crime is that the offender “engage in conduct that violates” one of 68 specifically enumerated crimes, S. 1673 would not in any way expand the universe of violent individuals subject to federal prosecution.

S. 1673 may also be counterproductive to federal efforts to stop domestic violence. Because S. 1673 does not require that the government first obtain a conviction for the underlying conduct against a pregnant woman, S. 1673 may actually reduce the number of prosecutions brought for injury to the pregnant woman. If, for example, a person “forcibly . . . intimidates” a female postal worker during the first month of her pregnancy, and she miscarries, a prosecutor would have two options in prosecuting the aggressor (i) for violating 18 U.S.C. § 111, which carries a one-year maximum sentence; or (ii) for violating the offense created by S. 1673, which would carry a maximum life sentence because causing the miscarriage is treated as if the aggressor murdered the pregnant woman, a federal officer. This is a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to the woman who is not pregnant. A prosecutor faced with this choice may therefore proceed solely under S. 1673's new offense. Even if the prosecutor initiated a dual prosecution for both crimes, the prosecution for injury to the “unborn child” is likely to overshadow the prosecution for injury to the pregnant woman. In either event, rather than reinforcing the federal government's commitment to ending violence against women, this bill would downplay or ignore the significance of the injury to the woman.

S. 1673 may also be unconstitutional in some of its applications. The drafters of S. 1673 were careful to recognize that abortion-related conduct is constitutionally protected.⁴ The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent “is implied by law in a medical emergency.”⁵ Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on the constitutionally protected conduct.

Most troubling, however, is the fact that S. 1673 may be perceived as gratuitously plunging the federal government into one of the most difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues. The bill's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. Moreover, such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women.

Other, more effective means of federal intervention to stop domestic violence and other violence against women currently exist. If the progress over the past 5 years in any harbinger of the potential for success, reauthorizing VAWA is a straight-forward and effective way to diminish violence against women. Moreover, there are other available avenues that are better tailored than S. 1673 to addressing the additional harm a pregnant woman suffers when her fetus is injured. We are willing to work with Congress to strengthen the criminal provisions of VAWA, and to develop alternative legislation to strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant. The availability of these better tailored alternatives makes enactment of S. 1673 unnecessary, and even more unwise as a policy matter.

For all of these reasons, the Administration strongly opposes S. 1673, and the President's senior advisors would recommend that he veto the bill. Instead, we urge the Senate to support the reauthorization of VAWA as a more direct and effective way to combat violence against women and violence against the unborn.

Thank you for the opportunity to testify on this legislation.

⁴ See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁵ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her “unborn child.”

Senator DEWINE. I see that Congressman Graham is here. Lindsey, welcome. Your timing is perfect. It is nice to see you in person. We have seen you on TV a lot in the last couple of weeks.

Representative GRAHAM. No better looking in person.

Senator DEWINE. Thank you for joining us. You may proceed.

STATEMENT OF HON. LINDSEY O. GRAHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Representative GRAHAM. Thank you, Mr. Chairman. This is the ultimate in political efficiency. You run a good ship here. I just got off the plane.

Mr. Chairman, thank you very much for calling this hearing on S. 1673, the Unborn Victims of Violence Act. I would also like to commend you for taking the lead on this effort in the Senate. I was greatly encouraged by the House passage. It was a bipartisan vote. We had a few pro-choice and pro-life people coming together on a piece of legislation and that is a great thing. There is not much of that going on in America, so I am very encouraged by that bipartisanship and people reaching across the abortion argument to try to do something I think most Americans would find appropriate.

Protecting the unborn certainly is not a new idea. About half the States in this country have laws that criminalize behavior that kills or injures an unborn child. And in recent events, television coverage has shown us that this is not just something to talk about; it actually happens. We are having very prominent people shoot pregnant women, destroying children, harming children.

I think you will have Ms. Pace who will testify. Has she testified yet, Mr. Chairman?

Senator DEWINE. She will be testifying.

Representative GRAHAM. Please listen to her story. And when you want to figure out which way to go, sentence enhancement or having a separate offense, I would suggest to you that the 24 or 25 States in this area have got it right, that sentence enhancement is the minority view of what to do with criminals.

What we are talking about, Mr. Chairman, are criminals. We are not talking about a woman's right to choice. We are talking about what does society do when somebody, through criminal activity, harms or destroys an unborn child when the mother decided to bring the child into the world. Half the States say let's put that person in jail. That is what I say.

The Federal law is silent on this matter. This legislation deals only with Federal criminal statutes. The only time you could be prosecuted under the Unborn Victims of Violence Act is if you commit a Federal offense against the mother. So we are not expanding jurisdiction. We are trying to fill in a gap.

There are situations, because of the territory involved, that are exclusively Federal. The status of the person is exclusively Federal. Sometimes, State law doesn't apply. If a Member of Congress was pregnant, this statute would apply because it is a Federal offense to assault a Member of Congress. So if you had a Member of Congress that was pregnant and someone assaulted them and destroyed her unborn child, this statute would allow two prosecutions, like 24 States do, when the mother is the victim of assault and her unborn child is also the victim of that assault.

Examples abound. The Arkansas case, I think you are going to find very chilling. In that situation, the supposed boyfriend hired people to go take the woman, who was in the ninth month of pregnancy, and literally beat her for the purpose of destroying her child. And they are facing murder charges, and they should. Sentence enhancement would not address justice in that case.

Their purpose was to take this woman, isolate her, and beat her to the point that her child would be destroyed because the man did not want to accept responsibility. Their intent was to destroy the child, also to hurt the mother. I think justice would demand that they stand before a court for two offenses, destroying the unborn child and harming the mother. And adding an additional punishment to the mother doesn't address the loss that society has felt because that wasn't their desire. Their desire was to kill that child because he did not want to take responsibility.

So I totally reject the idea that adding an enhancement to the offense against the mother is an appropriate response. I think society's appropriate response is found in the majority of statutes that exist at the State level which make it a separate offense, and that is what we are trying to do here today. We are trying to create a body of law that would apply in Federal situations to address horrific events. In the event that someone chooses, through their criminal misdeeds, to harm a pregnant woman and harm or destroy her unborn child, they should stand before the law for two events, not one.

The statute is well-drafted. It protects medical professionals, it protects the woman's right to choose. In no event can the woman herself be prosecuted. It only applies to third-party criminals. And it is my hope and dream in this country that we of the pro-life and pro-choice persuasion can come together on a few issues, this being one, that the criminal should go to jail for destroying or harming the unborn after the mother decides to bring the child into the world.

And in terms of notice, when you assault women of child-bearing years, you do so at your own risk. I think that is a concept well-settled in law and is a good concept to have in this bill. One thing is for sure: you don't have a problem if you don't beat on pregnant women. And if you choose to beat on somebody of child-bearing years and you didn't know they were pregnant, the story goes like this: I can't be prosecuted, that is silly. If I shoot at A and hit B, I am going to jail because I hurt somebody. My intent was to hurt A; I just happened to hurt B.

So if you set in motion violence or activity that results in destroying a child or injuring an unborn child, under the theory of transferred intent, which is one of the oldest theories in law, under this statute and 24 other States like it, you can go to jail. And, Mr. Chairman, I think you should.

Thank you very much for having me. Please listen closely to what happened in Arkansas. Please listen closely or read closely the events that have dominated our headlines about women being assaulted and their children being hurt in the womb. I think you will find that the appropriate course of conduct is to mirror the dominant State law in this area, and that is allowing separate offenses for the crime of destroying the unborn child.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Feinstein.

Senator FEINSTEIN. If you have a moment, Congressman, I would like to ask you a question.

Representative GRAHAM. I have got until 3 p.m.

Senator FEINSTEIN. Let me ask you this question. My concern deals with the bill that says you don't have to have knowledge or intent.

Representative GRAHAM. Yes, ma'am.

Senator FEINSTEIN. All right. The woman, newly pregnant—let's say she is assaulted. She miscarries. The assailant is guilty of murder?

Representative GRAHAM. It depends on the intent. Let me give you an example.

Senator FEINSTEIN. But you just said the bill does not—the bill excludes having knowledge or intent, as I understand it.

Representative GRAHAM. Yes, ma'am. Here is what would happen. If you assault somebody that is in a weakened condition and you push them and your intent is at a simple assault level and it results in death, you set in motion the person's death, but your intent was not to kill. You would be charged with involuntary manslaughter. It would be the same here.

If you got in a shoving match with a pregnant woman and you were guilty of a simple assault and it resulted in the death or the destruction of her unborn child, you would be guilty of involuntary manslaughter. The punishment would be the same as if it happened to the mother herself.

Senator FEINSTEIN. Even though neither she nor the assailant knew she was pregnant?

Representative GRAHAM. Yes, ma'am, and cases abound on this issue. If I shoot at you and I hit somebody behind you, my intent is not to hurt them, my intent is to hurt you. I am guilty under the law for setting in motion criminal activity that resulted in harm to somebody, even though I didn't know that person was there or I didn't intend to hurt them. That is a well-settled concept in constitutional law. In all these States, that has been litigated a lot.

Senator FEINSTEIN. Now, take a police officer in pursuit of his or her duty who restrains an individual. Obviously, it is a physical restraint, and the woman is newly pregnant and miscarries. What is the judgment against the police officer?

Representative GRAHAM. The first question would be did the police officer exceed their lawful authority to use physical force. If the answer is no, there is no prosecution because there has been no crime. Police officers are allowed to use the force necessary, given the conditions that confront them. However, what about—

Senator FEINSTEIN. Many times, there is controversy about that.

Representative GRAHAM. But the way you settle that controversy is to have a jury or a prosecutor. What if the belief of the prosecutor is that the police officer in question used excessive force, unlawful force? Then the police officer would be just like any other citizen. If the police officer was charged with using unlawful force and the jury believes that the police officer used unlawful force, they are responsible for the consequences of that unlawful activity.

In the case of an excessive arrest, it would be involuntary manslaughter because there is clearly no intent to kill, but there is a clear stepping out of the role of the authority given the police officer. And I think most Americans would say that if a police officer uses excessive force against a pregnant woman and her child is destroyed, the police officer ought to be prosecuted for that destruction. At least I would say that.

Senator FEINSTEIN. Well, I think that is a broad, sweeping statement about any circumstance that might occur, and we are not identifying the circumstance, respectfully.

Representative GRAHAM. Senator, here is the common theme: the only time you can be prosecuted under the statute is if you have done illegal activity toward the mother. If there is no illegal activity, you are not subject to prosecution. And it has to be a Federal event; it has to be a situation where Federal law already applies against the mother. So somebody who is lawfully engaging in law enforcement activity has no fear. It is only the people that step out from the color of law that have any worry, any time, anywhere, a police officer or otherwise.

Senator FEINSTEIN. Thank you very much.

Representative GRAHAM. Thank you.

Senator DEWINE. Congressman, let me just ask, if I could, a couple of questions. I think your explanation and your answers to my colleague from California have been very good.

Representative GRAHAM. They were very good questions.

Senator DEWINE. And they are very good questions, and you have both gotten to, I think, the heart and core of what we are going to be talking about and debating.

You know, you didn't use these terms, but a basic principle of law is that we take our victims as we find them. And your example of pushing someone and you did not know—

Representative GRAHAM. They had an aneurism.

Senator DEWINE [continuing]. They had an aneurism or they had some problem. You are not charged with murder. What you are charged with is some form, depending upon the statute and the State, of manslaughter.

Representative GRAHAM. Exactly, because your intent was not to kill, but you created the death.

Senator DEWINE. I think sometimes you have to point out the obvious. There is a criminal intent there.

Representative GRAHAM. Right.

Senator DEWINE. Now, it may not have been to kill that person, but there was a criminal intent. And if you didn't have a criminal intent, which is one of the elements of every crime, we wouldn't be in the courtroom. The grand jury wouldn't have indicted or the prosecutor wouldn't have brought the case.

So we are not talking about a novel concept of law. We are talking, as you have pointed out, about something that is well-settled, going back long before the beginning of this country. These are basic, basic doctrines that are not foreign to us at all.

Representative GRAHAM. Yes, Mr. Chairman.

Senator DEWINE. So I think you have to have an intent. You can't have a criminal charge without intent, and this is analogous to taking your victim as you find your victim, whatever your knowl-

edge was. You didn't know that victim had an aneurism, you didn't know that victim was pregnant.

Representative GRAHAM. And it is simple. If you don't hurt people, you have got nothing to worry about. Let me give you an example in the military of why we need this statute.

Senator FEINSTEIN. Before you do that, could I just add one thing? Would you allow me?

Senator DEWINE. Sure.

Senator FEINSTEIN. What I don't understand is the law specifically says that you do not require proof of intent or you do not require proof of knowledge. It is specific.

Representative GRAHAM. Yes, ma'am.

Senator FEINSTEIN. So the argument then, well, you would have to have proof of intent, particularly when you come—you know, I grant you the case when the pregnancy is visible. I mean, women are all different. The ability to miscarry, as one who has—some women miscarry very easily.

Representative GRAHAM. Yes, ma'am. Let me give you an example about the—

Senator FEINSTEIN. And you are putting the police officer in huge jeopardy.

Representative GRAHAM. No, ma'am, I don't think so. Let me give you an example about how the word "intent" is used in the law. Drunk driving. You don't have to intend to drunk-drive; you just do it. If somebody is drunk-driving, runs a stop sign and hits a woman going down the road and she is pregnant, they are going to jail under this bill if Federal jurisdiction applies. We don't worry about their intent because most drunks are too drunk to form an intent.

Senator DEWINE. If I could just interject, in your case, Congressman, you do have to intend—there is always an intent. You have to intend to drink. You know, you have to have some intent to take some action. What the law we are talking about is saying is that there is not a requirement for intent in regard to the fetus, but there was an intent to do the initial act that set in motion these consequences, just as when you walk up to a person who has some physical problem that is not apparent and you do something to them, you set that in motion.

You didn't know they had an impairment. You didn't know they were going to die just because you pushed them like that, but again you take your victims as you find them. I think we can discuss whether this is the way to proceed, is this the best way to do it. But I don't think that any of us can say that this is a concept that is foreign to our law or foreign to our basic set of values or our whole criminal law that has developed over the last several hundred years.

Representative GRAHAM. Yes, sir. Twenty-four States have statutes very similar to this. Before my life in Congress, I was a prosecutor in the military. I looked long and hard to make sure it didn't overstep *Roe v. Wade* bounds, looked long and hard to make sure it withstood the constitutional test that had been levied against other statutes. The doctrine of transferred intent has withstood scrutiny. The knowledge element has certainly withstood scrutiny.

All it says is that if you bring in force motion to hurt someone of child-bearing years, you do so at your risk.

And the bottom line about why I got involved is as a former prosecutor in the military, Senator Feinstein, I found several cases that were very disturbing. A gentleman, an Air Force member, repeatedly assaulted his wife and on this particular occasion just went berserk, took out a T-shirt—she was 7 or 8 months pregnant—and beat her within an inch of her life and destroyed the child.

Under the military law that exists today, there is no provision to prosecute that person for the death of the unborn child. I think most Americans would believe that he should be prosecuted in that case because the result of his activity against the mother was destroying an innocent person.

There is a law in effect in this Nation that kind of speaks a lot about what I am saying. Do you know that federally you cannot execute a pregnant woman? I think the reason that law exists is that whatever sins that the mother may have committed, we do not want to take that innocent life by the State. So we are going to wait until the pregnancy is over for the execution, and I think that is analogous here.

We don't have to worry about the abortion debate. We should all be able to agree that if a third-party criminal chooses to destroy an unborn child brought into the world by the mother, they should go to jail because they have done something separate other than hurt the mother.

Thank you very much.

Senator DEWINE. Congressman, one last question, if I could. You debated this issue in the House of Representatives. It is my understanding there was an alternative offered which had to do with sentencing enhancements.

Representative GRAHAM. Right.

Senator DEWINE. Do you want to describe for us why you think that was rejected in the House?

Representative GRAHAM. Well, I think it was rejected because the overwhelming majority of the States have rejected that concept because the harm that you are going to—in the Arkansas case, they had a specific set of plans. The plan was to destroy the unborn child. They intended to beat the mother for the effect of killing the child. I think most Americans would believe that should be prosecuted separately because that is truly what their criminal intent was, to hurt the mother and kill the unborn child.

We have in this statute that the right of the woman to decide issues about her own body is left unaffected. But in terms of criminal law, if you can prove somebody destroyed the unborn child as to criminals, as to third parties, this child has status in the law subject to prosecution. And I think justice would demand two prosecutions in Arkansas—a vicious assault on the mother and the death of a 9-month-old, 7-pound baby girl.

Senator DEWINE. Congressman, thank you very much. We appreciate your testimony. It has been very helpful.

I would ask our next panel to please come forward and I will introduce you as you are coming up.

Shiwoona Pace. We are very pleased to have her, from Little Rock, AR. Last August, Ms. Pace was expecting when she was physically

attacked by several men who were hired to kill her unborn child. Unfortunately, her baby did not survive the attack. Four men have been charged with the assault against her and the subsequent death of her unborn child under Arkansas' new fetal homicide law. We thank you very much for coming today.

Our next witness will be William Croston, who is from Charlotte, NC. He is here representing his family. Many of us have heard the story of Ruth and her unborn child's death at the hand of Reginald Falice. Mr. Falice was convicted of the murder of Ruth Croston under interstate domestic violence provisions.

Joseph Daly is here from Middletown, in my home State of Ohio. He was the husband of the late Suzanne Daly, who was 8½ months pregnant when she and her unborn child were killed by a reckless driver. Ohio law was changed to allow prosecution for the death of an unborn child largely because of this tragedy and largely because of the efforts of Mr. Daly.

We thank all of you for your willingness to be here today, and I will start from left to right with Ms. Pace. You may proceed. We have your written statement which we will make a part of the record for all three of the witnesses, and we would just ask you to proceed and tell this panel anything you wish.

Ms. Pace, thank you for coming.

**PANEL CONSISTING OF SHIWONA PACE, LITTLE ROCK, AR;
WILLIAM CROSTON, CHARLOTTE, NC; AND JOSEPH P. DALY,
MIDDLETOWN, OH**

STATEMENT OF SHIWONA PACE

Ms. PACE. My name is Shiwona Pace and I reside in Little Rock, AR, where I am currently pursuing a degree in psychology at the University of Arkansas at Little Rock.

On the night of August 26, 1999, I became the victim of a brutal assault that led to the death of my unborn daughter, Heaven Lashay Pace. My reason for being here today is to share my story with you in hopes that the tragedy that I endured can somehow make a difference.

On January 6, 1999, I found out that I was 2 months pregnant. Upon learning this, I told my then boyfriend that he was going to be a father. His initial reaction was that however I chose to proceed would be fine with him because he would be there for me. After careful consideration, I decided that although this pregnancy had occurred unexpectedly, I wanted to keep my baby. When I informed him of my decision, his attitude changed completely. He went from being that of a pleasant-natured person to an irate and hostile one.

He told me that he would have nothing to do with me or the baby because he had no desire to be a father. Naturally, I was appalled. Immediately, I realized the possibility that my baby would not have her father in her life, and although I wanted very much for them to have a relationship, I did not want to pressure him. Therefore, I discontinued all communication with him because I knew that it would be in my best interest, as well as the baby's, to avoid any type of stress throughout my pregnancy.

Several months went by and Erik and I had no contact. In June 1999, I had my second ultrasound which revealed that I was going to have a baby girl. It was then that I decided to name her Heaven. After leaving the doctor's office, I went to Erik's place of employment to share the news with him. It had been several months since we had spoken, but I still felt as though he had the right to know what his first child was going to be.

He expressed to me that he had no interest in the sex of the child and that he still had absolutely no desire to be a father. However, he contacted me weeks later with somewhat of a changed outlook, and from that point we began speaking on a regular basis. Things still weren't the way they used to be between us, but they were better.

On the night of August 26, 1999, one day before my due date, my 5-year-old son and I accompanied Erik to his home at 9212 Monique Drive. It was there that I was assaulted by three masked men. One of them dragged my son and Erik to a room in the back of the house while the other two proceeded to beat me and demand money.

I begged and pleaded for the life of my unborn child, but they showed no mercy. In fact, one of them told me, "I" you, your baby is dying tonight. I could hear my son in the background crying and saying that he wanted his mommy, but I couldn't do anything to comfort him. As I lay face down crying and begging for them to stop, they continued to beat me. I was choked, hit in the face with a gun, slapped, punched, and kicked repeatedly in the stomach. One of them even put a gun in my mouth and threatened to shoot. About 30 minutes afterwards, the three fled and I was rushed by ambulance to the hospital, where tests revealed that my baby, Heaven Lashay Pace, had died as a result.

One week later, on September 2, 1999, Erik Bullock and the three guys that attacked me were arrested and charged with first-degree battery and capital murder. According to testimony and confessions given by the three suspects, Erik had apparently hired them to fake a robbery at his house and beat me to the point that I would lose my baby because he didn't want his current girlfriend to find out, and also because he did not want children. One of the suspects stated that Erik had also participated in the attack.

Today, the three suspects—Derrick Witherspoon, Lonnie Beulah and Eric Beulah—all remain in jail. However, Erik Bullock is free. After being charged with capital murder and serving a mere 2 months in jail, Pulaski County Circuit Judge John Plegge granted him a million-dollar bond and he was released in early November.

Since this time, Erik has resumed his life as though nothing has happened, but my life has changed dramatically. I lost a part of me, a child that I desperately wanted and was looking forward to having. And my son lost the baby sister that he had always wanted. After 9 months of preparation and excitement, I have nothing to show—cheated, robbed, and forever heartbroken.

Although my story and my being here today can't change what has happened, I am hoping that my testimony can change what will happen. Criminals such as Erik Bullock who show a blatant disregard for human life should be punished accordingly. The loss of any potential life should never be in vain.

Thank you.

Senator DEWINE. Ms. Pace, thank you very much.

[The prepared statement of Ms. Pace follows:]

PREPARED STATEMENT OF SHIWONA PACE

My name is Shiwona Pace, and I reside in Little Rock, Arkansas, where I am currently pursuing a degree in physiological psychology at the University of Arkansas at Little Rock. On the night of August 26, 1999, I became the victim of a brutal assault that led to the death of my unborn daughter, Heaven Lashay Pace, and my reason for being here today is to share my story with you in hopes that the tragedy I endured can somehow make a difference.

On January 6, 1999, I found out that I was two months pregnant. Upon learning this, I told my then boyfriend that he was going to be a father. His initial reaction was that however I chose to proceed would be fine with him; he would be there for me. After careful consideration, I decided that although this pregnancy had occurred unexpectedly, I wanted to keep my baby. When I informed him of my decision, his attitude changed completely. He went from being that of a pleasant-natured person to an irate and hostile one. He told me that he would have nothing to do with me or the baby because he had no desire to be a father. Naturally, I was appalled. Immediately, I realized the possibility that my baby would not have her father in her life. And although I wanted very much for them to have a relationship, I did not want to pressure him; therefore, I discontinued all communication with him, because I knew that it would be in my best interest—as well as the baby's—to avoid any type of stress throughout my pregnancy.

Several months went by and Erik and I had no contact. In June of 1999, I had my second ultrasound, which revealed that I was having a baby girl. It was then that I decided to name her Heaven. After leaving the doctor's office, I went to Erik's place of employment to share the news with him. It had been several months since we'd spoken, but I still felt as though he had the right to know what his first child was going to be. He expressed to me that he had no interest in the sex of the child, and that he still had absolutely no desire to be a father. However, he contacted me a few weeks later with somewhat of a changed outlook, and from that point, we began speaking on a regular basis. Things still weren't the way they used to be between us, but they were better.

On the night of August 26, 1999 (one day before my due date), my five-year-old son and I accompanied Erik to his home at 9212 Monique Drive. It was there that I was assaulted by three masked men. One of them drug my son and Erik to a room in the back of the house, while the other two proceeded to beat me and demand money. I begged and pleaded for the life of my unborn child but they showed me no mercy. In fact, one of them told me, "F**** you. Your baby is dying tonight." I could hear my son in the background crying and saying that he wanted his mommy, but there was nothing that I could do to comfort him. As I lay face down crying and begging for them to stop, they continued to beat me. I was choked, hit in the face with a gun, slapped, punched, and kicked repeatedly in the stomach. One of them even put a gun in my mouth and threatened to shoot.

After about thirty minutes, the three fled, and I was rushed by ambulance to the hospital, where tests revealed that my baby, Heaven Lashay Pace had died.

One week later, on September 2, 1999, Erik Bullock and the three guys that attacked me were arrested and charged with first-degree battery and capital murder. According to testimony and confessions given by the three suspects, Erik had apparently hired them to fake a robbery at his house, and beat me to the point that I would lose my baby, because he didn't want his current girlfriend to find out about my pregnancy. One of the suspects stated that Erik had also participated in the attack.

Today the three suspects, Derrick Witherspoon, Lonnie Beulah, and Eric Beulah, all remain in jail. However, Erik Bullock—the man that orchestrated the plot—is free. After being charged with capital murder, and serving a mere two months in jail, Pulaski County Circuit Judge John Plegge granted him a \$1,000,000,000 bond and released him in early November.

Since this time, Erik has resumed his life as though nothing has happened, but my life will never be the same. I lost a part of me—a child that I was so looking forward to having. My son lost the baby sister that he'd always wanted. After nine months of preparation and excitement, I have nothing to show. Cheated, robbed and forever heartbroken.

Although my being here today can't change what has happened, I am hoping that my testimony can change what will happen. Criminals such as Erik Bullock who

show a blatant disregard for human life should be punished accordingly. The loss of any potential life should never be in vain.

Senator DEWINE. Mr. Croston.

STATEMENT OF WILLIAM CROSTON

Mr. CROSTON. My name is William Croston. I am here today to share with you my family's courtroom experience related to the loss of an unborn child. I also wanted to make one other comment about some of the discussions that have taken place prior to my testimony here this morning.

I am not a legal person and I can't speak to you about what people's intentions are or how this law affects or concerns people have about the law as it relates to *Roe v. Wade* and all the other things that have been discussed. What I can tell you is that when people go into the courtroom, what they expect is proper justice and judgment. And today, because you don't have this law on the books, people are not getting that. So whatever it takes for you to make this happen and get it right, we really need to do that.

Let me start by telling you that on April 21, 1998, my unborn niece was the victim of a violent crime when my sister, her mother, was killed by a gentleman by the name of Reginald Falice. Reginald Falice, who was a former boyfriend of my sister's, drove from Atlanta, GA, to Charlotte, NC, with the intention of murdering my sister. He came to my mother's home where she was staying that morning and had an argument with my sister, and while she was on her way to work one block from my mother's home, he shot her approximately 6 times and then fled to his hometown in Virginia. He was later caught by the police and confessed to the crime. The important thing that you need to understand here is that he was her former boyfriend. He knew that she was carrying an unborn child. This is not a case where he didn't know what he was doing.

The area that I would like to focus on with you in my testimony is what happened when we went to court. Prior to the beginning of the trial, with the jury not present—the jury was not in the courtroom at the time—the judge made the statement that he did not want the jury to know that Ruth Croston was carrying an unborn child.

Now, let me make it clear I have no problems with the judge because what I understand is that the judge was following the law as it is written today. The problem obviously is that we need to change the law. And I can tell you that there is a great hurt on the part of myself and my other family members when you lose a person like that. You know, part of the therapy when you lose someone—and I know that everyone in here at some time has lost somebody that is close to them—is that you can cling to the experiences that you have had with that person. You can remember the things that you have learned from that person. You don't have that with a child that is unborn, a person that you waiting to come into the world who never got here.

Let me go back to the trial for a minute and make the point I wanted to make here that I think we have to look at this in the larger context of the fact that you have a defense team that is trying to clean up the image of the criminal. And when you drop a charge—or not really drop, but you don't even bring a charge for

harm to an unborn child, you are aiding the defense and making this person look better.

Now, in my sister's case, that did not help Reginald Falice, and the reason it didn't help him is because he had confessed to the crime. The concern I have is that you probably have now in the courtroom cases where the defense team is preparing something that allows an individual like this to come back out. And I think Shiwona offered that example to you just a minute ago. What needs to happen is that these people need to be held accountable for the crimes they commit.

So let me say this to you in closing. What we need to do is look at the realities of the things that are going on in the world today. Only 2 weeks ago, a young lady was found in North Carolina who was pregnant dead. They don't know who did it. In the fall of this year, a young woman by the name of Sharika Adams was attacked allegedly by—and I say allegedly because it has not gone to court yet—by one of the Carolina Panthers.

There are just too many of these type of cases that exist today, and for me personally each time I hear about it, I have to relive it. And so what I would say to you is work out all the little gory details—again, I am not a legal person—figure out what it takes to put the laws on the books that can prevent these individuals today who are walking out of the courtrooms after they commit crimes.

Thank you.

Senator DEWINE. Thank you very much.

[The prepared statement of Mr. Croston follows:]

PREPARED STATEMENT OF WILLIAM CROSTON

My name is William Croston. I am one of Ruth Naomi Croston's brothers. On April 21, 1998, my sister, Ruthie, and her unborn child were murdered by Reginald Falice. As a result of the murder of Ruthie and her unborn child our family had to go through a trial. The trial was the process of giving Falice his day in court even though Reginald Falice has confessed to the murder of Ruth Croston prior to the trial. One major disappointing aspect of the trial was that Falice was NOT charged with the murder of the unborn child that Ruth Croston was carrying.

Under current law we simply choose to dismiss the life of the unborn child. In fact, prior to the beginning of the trial the Honorable Judge Graham C. Mullen indicated that he didn't want the jury to know that Ruth Croston was carrying an unborn child. While I understand that the intent here is to avoid jury sympathy for the victim, the reality is that the current process dismisses the life of the unborn child and the family's suffering associated with a very real loss. The difficulty of accepting the loss of Ruth Croston and her unborn child is greatly enhanced by the fact that the unborn child was the child of Ruth Croston and Reginald Falice. Reginald Falice knowingly murdered Ruth Croston and their unborn child. However, the current law does not consider the unborn child a part of the irresponsible actions committed by Reginald Falice.

Unfortunately the thoughts in the mind of some persons in today's society have reached a point of no respect for the life and rights of others. We need to update today's laws to conform to the reality of the crimes committed in society today. Today's federal laws ignore and/or dismiss crimes against the unborn child. Example: *United States vs. Reginald Falice*. We need to update today's out-of-date laws to include consequence for criminals who cause harm to unborn children through an act of violence against the mother. The important factor to consider in the case of *United States vs. Reginald Falice*, is that Reginald Falice knew that Ruth Croston was carrying his unborn child. Why not bring charges for violence to the unborn child?

In closing, the Committee should understand that our family will forever be in mourning over the loss of Ruth Croston and our unborn niece. Our grief will last a lifetime. The emotional effect of the death of our niece resurfaces each time we

hear about another unnecessary act of violence against a pregnant woman. The impact of the irresponsible actions of Reginald Falice will be with me and my family for the rest of our lives. I hope that the Senate Judiciary Committee will find the wisdom to bring the current law up-to-date with the reality of the crime committed in society today. It is imperative that we hold criminals responsible for their acts of violence against pregnant woman and their unborn children.

Senator DEWINE. Mr. Daly.

STATEMENT OF JOSEPH P. DALY

Mr. DALY. It is a bittersweet day for me as I sit before you and give you my testimony. On one count, I am very proud that I have changed the laws in Ohio to recognize unborn children. On the other, I have to face the memories of great pain and sadness. It has been 4½ years, but you have to revisit it.

On an early August morning in 1995, I kissed my wife, Suzanne, goodbye as she went out the door for her early-morning commute to a preschool outside Cincinnati, where she worked as a teacher. Suzanne was just 3 weeks away from delivering our first child and within a few days of maternity leave. We had waited almost 5 years to have our first child and waiting for Suzanne to finish college and waiting for us to be financially responsible. The nursery was ready, equipped with just about everything we would need. Almost giddy with anticipation, our future seemed very bright.

But in a split second, our bright future was snuffed out. Suzanne and our unborn son, Austin, were killed by an unlicensed 16-year-old driver that was driving a stolen car that crossed the median and slammed head-on into her car. When I heard this devastating news, I felt like that my life too was over.

I learned on the day that my wife was buried that the driver who had taken their lives could not be prosecuted for taking two lives under Ohio State law. She was charged with just one count of vehicular homicide. I was not only angry, but insulted, insulted not for just me, but for Suzanne. Over and over, I would replay the videotape of our sonogram showing my healthy son almost ready to be born. No one could tell me that this was not a human being. It was my son, our son, just days away from meeting Suzanne and I, his parents.

After burying my wife and son, I knew I would face many challenges. My first was to change Ohio's antiquated laws regarding the unborn. I knew it wouldn't bring back my wife and son, but it might change the life of others and changed the way that Ohio viewed the unborn. With the help of my family, friends, and thousands of Ohioans, we worked hard to raise awareness and get Ohio's laws changed.

After many months of attending various committee meetings in Columbus, just like I am doing now, giving proponent testimony, my challenge ended in triumph. On June 6, 1999, then Governor George Voinovich signed into law what many refer to as the Daly bill. This new law permits prosecutors to charge people who harm or kill unborn babies while committing a crime.

Since that time, I have been contacted by many heartbroken couples who have asked me to help them begin similar campaigns in their own States. They too were shocked to learn criminal charges could not be filed when their unborn child's life was terminated.

Over the past few years, similar legislation has been proposed and enacted at the State level, but not all States have laws protecting pregnant women, nor does the Federal Government. It is now time to deal with that at a Federal level.

Over the years, this type of law has been tested and proven constitutional in many States, including Ohio. Yet, many States' civil law continues to conflict with criminal law. Isn't it grossly inconsistent to construe a fetus as a person for the purposes of civil liability while refusing to give it similar classification within the criminal code?

This bill should be bipartisan, a common-sense piece of legislation that protects a woman's right to carry her unborn baby or child to term. It covers only wanted pregnancies and the right to win a conviction for harm or death to an unborn child only if it is proven that the defendant violated Federal law with respect to the mother. It would be very hard to harm or kill the unborn without harming or killing the mother, wouldn't it? That is why we need two separate offenses.

The bill does not try to define when life begins, nor will it have any impact on pro-choice or pro-life agendas because it isn't about a woman's choice to prevent or abort a fetus. It is about a woman's right not to have her unborn child's life illegally terminated. Nowhere in the proposed bill does the Federal Government have to take the responsibility in determining when a fetus is viable or when an embryo becomes a human being, or even how many rights should be given to the unborn. All I want, all that my wife would have wanted is recognition of the simple fact that every woman should have the right to carry her baby to term, and in this instance every child should have the legal right to be born. Any person who violates those rights and kills an unborn child should ultimately face the consequences of their actions.

If a woman has the constitutional right to prevent or abort a pregnancy, she should have the same right to carry that baby to term and hold responsible anyone who takes that right away. In the circumstance when a woman and an unborn child can't protect themselves, the government should. Isn't this why legislation is enacted in the first place, to protect each and every one of us to the guarantee of the right to life, liberty, and the pursuit of happiness? I think my wife was violated of all three of those rights.

To Suzanne and me, we wanted our unborn son from the very moment we learned that she was pregnant, the very moment. To us and everyone around us, we were expecting a child, an unborn child at that time, that was wanted and had the right to be born. Every woman has the right to experience the joy of bearing the child she so desperately wants, no matter where she may live or travel. That is not true right now. This Federal legislation will go a long way in providing a woman the right to greet her baby face to face.

In conclusion, my sincere hope is that this piece of Federal legislation will also serve as a springboard for the other 20-plus States that do not have any criminal laws relating to unborn children to pass such laws. There is not a human being on the Earth that was not at one time an unborn child.

I thank you.

[The prepared statement of Mr. Daly follows:]

PREPARED STATEMENT OF JOSEPH P. DALY

On a desperately hot day in August of 1995, I kissed my wife, Suzanne, good-bye as she went out the door for her morning commute to a preschool outside Cincinnati where she worked as a child care giver. She was just three weeks away from delivering our first child and within a few days of maternity leave. We had waited almost five years to have our first child, waiting for Suzanne to finish college. The nursery was ready, equipped with just about everything we'd need. Almost giddy with anticipation, our future seemed bright.

But in a split second, our bright future was snuffed out. Suzanne and our unborn son, Austin, were killed by an unlicensed 16-year-old girl driving a stolen car that crossed the median and slammed head-on into her car. When I heard this devastating news, I felt like my life, too, was over.

I learned the day my wife was buried that the driver who had taken their lives could not be prosecuted for taking two lives under Ohio law. She was charged with just one count of vehicular homicide. I was not only angry, but insulted! Over and over I'd replay the videotaped sonogram, showing my healthy son, about ready to be born. No one could tell me that this was not a human being. It was my son . . . just days away from meeting his parents.

After burying my wife and son, I knew I'd face many challenges. My first was to change Ohio's antiquated laws regarding the unborn. I knew it wouldn't bring back my wife and son, but it may change the life of others. With the help of family, friends and thousands of Ohioans, we worked hard to raise awareness and get Ohio's law changed. After many months of attending various committee meetings in Columbus, my first challenge ended . . . in triumph. On June 6, 1996, then Governor George Voinovich signed into law what many refer to as the "Daly bill." This new law permits prosecutors to charge people who harm or kill unborn babies while committing a crime.

Since that time, I have been contacted by many heartbroken couples and asked to help them begin similar campaigns in their states. They, too, were shocked to learn criminal charges could not be filed when their unborn child's life was illegally terminated. Over the past few years, similar legislation has been proposed and enacted at the state level. But now it's time to deal with this issue at the federal level.

Over the years, this type of law has been tested and proven constitutional in Ohio and many other states. Yet, in many states civil law continues to conflict with criminal law. It is grossly inconsistent to construe a fetus as a "person" for the purpose of civil liability, while refusing to give it a similar classification in the criminal context.

This bill should be a bipartisan, common sense piece of legislation that protects a woman's right to carry her unborn child to term. It covers only wanted pregnancies and the right to win a conviction for harm to an unborn child only if it is proven that the defendant violated a federal law with respect to the mother. It does not try to define when life begins nor will it have any real impact on the Pro Choice or Pro Life agenda. Because it isn't about a woman's choice to prevent or abort a fetus! It's about that woman's right not to have her unborn child's life illegally terminated.

Nowhere in this proposed bill does the federal government have to take the responsibility in determining when a fetus is viable or when an embryo becomes a human being. Or even how many rights should be given the unborn. All I want is recognition of the simple fact that every woman should have the right to carry her baby to term; and in this instance every child should have the right to be born. And any person who violates those rights and kills an unborn child should ultimately face the consequences of their actions.

If a woman has the constitutional right to prevent or abort a pregnancy, she should have the same right to carry that child to term, and hold responsible anyone who takes that right away. In a circumstance when a woman and an unborn child can't protect themselves, the government should. Isn't this why legislation is enacted in the first place—to protect each and every one of us, to guarantee us the right to life, liberty and the pursuit of happiness?

To Suzanne and me, we wanted our unborn son from the very moment we learned that she was pregnant. We were expecting Austin, our child, a human being. To us, and everyone around us, we were expecting a child, an unborn child that was wanted and had the right to be born.

Every woman has the right to experience the joy of bearing the child she so desperately wants, no matter where she may live or travel. This federal legislation will go a long way in providing a woman the right to greet her baby face-to-face.

In conclusion, it is my sincere hope that this piece of federal legislation will also serve as a springboard for the other twenty-plus states that do not have any criminal laws relating to unborn children to pass such laws.

Senator DEWINE. Thank you very much, Mr. Daly.

Senator FEINSTEIN.

Senator FEINSTEIN. Well, let me just extend my deepest sympathy to the three people that have just testified. You know, there is no question that your stories are compelling, that they are real, that they happened. You have, I think, a lot of merit in what you say, and what is interesting to me is that there is commonality here in that all of your unborn children were almost at term, were capable of life outside the womb.

The women assaulted, or in your case, Mr. Daly, hit by the driver—the other driver wouldn't know she was pregnant, but nonetheless your wife was pregnant. In both Mr. Croston's case and Ms. Pace's case, there was both knowledge and intent that they were effectively taking the life of a child that could be sustained as life. So I think the point is made.

And I perhaps say this to you, Senator. I would like to see some bill that could take that into consideration. Mr. Croston said, I think, quite rightly, you know, his problem isn't to know the intricacies of the law, it is to see that justice is done. Of course, that should be our challenge as well.

On the other hand, I am still bothered by the unexpected—and let me just go back to one thing—and that is somebody that is newly pregnant, perhaps herself is acting in a criminal way, as to how you remedy this. And I am struck by my discussion with Congressman Graham because I can see an instance of restraint of a woman who is restrained under whatever she may be criminally culpable for. She may be drunk, but is visibly restrained by a police officer even in a way that perhaps there is proof of excessive restraint. That police officer is guilty of murder.

Senator DEWINE. Not murder.

Senator FEINSTEIN. What would it be?

Senator DEWINE. It would be manslaughter, I would assume.

Senator FEINSTEIN. But the police officer doesn't even know, and so this puts all accused or all defendants—

Senator DEWINE. Take your victims as you find them.

Senator FEINSTEIN. Well, I—

Senator DEWINE. Well, no. It is a basic principle and it is not a new principle, it is not a new concept.

SENATOR FEINSTEIN. So you fully intend that to be the case in your legislation?

Senator DEWINE. Your example again? I want to make sure I get it.

Senator FEINSTEIN. My example is this, that let's say the woman being restrained is culpable of a crime, or let's say she is excessively drunk.

Senator DEWINE. She has committed a crime, she has committed a crime.

Senator FEINSTEIN. Let's say she is excessively drunk and in order to restrain her, there is excessive force used.

Senator DEWINE. Well, Congressman Graham, I think, answered that very well. He went through as a prosecutor what you would have to determine when you looked at the case.

Senator FEINSTEIN. He said to me if there were no excessive force, he would not be guilty. But if there were, you know, what is and what isn't?

Senator DEWINE. You have to go into a fact determination of whether there was excessive force. You wouldn't even get to any of these questions unless there was excessive force and a jury had determined that, or that had been determined in a court of law. The threshold question is was there excess force used or not, and determine excess force you would obviously have to look at what the so-called victim was doing, what the person who was being restrained was doing, and all the surrounding circumstances.

But to carry it forward, if you determined the police officer was not acting correctly and did use excessive force, considering all the circumstances, and did, in fact, then commit an assault against the person who was being restrained, the intent that you would have to find under our bill would be that there was an intent to commit the assault. That is what the intent would be.

Senator FEINSTEIN. The bill doesn't say that, though.

Senator DEWINE. And if it turned out that she was pregnant and she miscarried, then you are into a manslaughter issue at that point. You are not into a murder case, you are into a manslaughter case.

If I could just for a moment, since we are on that—and we will just go back and forth; we don't have the clock on here. Mr. Daly, in your tragedy the person who came across and killed your wife and your unborn child, that person was guilty. That person has an intent to do the act, but that person didn't start out with the intent to kill your wife, but that person is still guilty, right?

Mr. DALY. That is true.

Senator DEWINE. That person is still guilty. And in your case—and if any other witnesses want to respond—I get the impression, and you pretty much stated it, that one of the things that you feel as a victim that you need is the recognition that it was a separate offense against your unborn child.

In other words, you have been here and listened to this. Some people are saying, well, we should just enhance the penalty for killing your wife. And I get the impression that that is not really what you want to see because that does not recognize that individual, that child.

Mr. DALY. I agree.

Senator FEINSTEIN. Before he answers, give me an opportunity to state—

Senator DEWINE. Well, I would like to see him answer first.

Senator FEINSTEIN. I don't think you stated it correctly.

Senator DEWINE. I didn't state what correctly?

Senator FEINSTEIN. Well, I assume you are referring to my comments about—

Senator DEWINE. No, not yours.

Senator FEINSTEIN [continuing]. Creating legislation that would provide an enhancement, and that is not entirely what I am talking about because what I am talking about is providing an oppor-

tunity for a judge to make a judgment that two lives were essentially lost. Therefore, the enhancement would relate to the second life.

Senator DEWINE. I was actually referring to our Department of Justice witness' testimony, but I think your point is well taken that you have a middle ground which does to some extent recognize certainly that second life.

Mr. Daly, you can answer and any of the other witnesses can answer.

Mr. DALY. It is a tiered program. I think that if there were penalties in her situation, it would be a tiered situation, but it would not apply. Vehicular homicide is different than aggravated vehicular homicide. Because it was aggravated at the time, she had the intent to kill. If she was drunk, she might have the intent to kill. You can't get a murder charge if there is no intent.

So in her example of using an officer and throwing her to the ground not knowing, the officer didn't have any intent to kill the baby, so he could never be charged with murder, as I understand it. You were a prosecutor yourself, so isn't that one of the stipulations of a murder that you have to have intent, design, and some other items?

Senator DEWINE. Sure, under murder, you would. Not on manslaughter, but on murder you would.

Mr. DALY. Exactly, so I think there are—you know, my point being that my wife and I wanted to have our baby. It was a wanted pregnancy, it was a planned pregnancy. We wanted it from the time that we found out about it. With technology today and science today, you can find out if you are pregnant when you are a day or two pregnant because of pregnancy tests that are over-the-counter.

My wife and I wanted our baby at that moment. It would have been just as unjust to take my son, Austin, at 4 weeks as it would have been at 8½ months to us. It would not have mattered, and I think that most mothers would agree.

In Ms. Feinstein's case, I ask if you have children—if you had two children on a school bus and a drunk driver hit the school bus and it exploded and killed everybody aboard, would you want one charge and charge the driver with one count of vehicular homicide or with two? If you were a mother, you would want two, not one charge, two charges.

I have some pictures that I would like to share with you, if I can, to the panel.

Senator DEWINE. That would be fine. Do you want to pass those out, Mr. Daly? They will pass them out for you.

Senator, anything else? We have one more panel.

Senator FEINSTEIN. No.

Senator DEWINE. I appreciate the three of you testifying. I will take a look at the pictures, Mr. Daly.

Mr. DALY. I would just like to use the pictures as part of my testimony.

Senator DEWINE. Oh, sure, sure. Do you want to proceed? Go ahead.

Mr. DALY. I will proceed. Do you have a copy of the picture?

Senator FEINSTEIN. Yes.

Mr. DALY. OK, let's take a look at it. The glossy photo that you see—what do you see?

Senator FEINSTEIN. An infant.

Mr. DALY. An infant, OK.

Senator FEINSTEIN. And your wife.

Mr. DALY. Right. If you look at this, I want to tell you that 99.9 percent of the American population will tell you that this is a baby. No one would ever tell you that this is a picture of an unborn person. This is a picture of my son, Austin, the day that I buried him. I put him in my wife's arms, in his mother's arms, to be buried. You can't bury a person until they have been born.

Now, it is tragic that he died in the womb, but this is proof that the unborn are people. If my wife knew that there was a possibility, or any woman knew that there would be a possibility—in Shiwona's case, if she knew that she would be violated to the extent that she was, she could have gone to the hospital and said I elect to have my baby be born right now. She has that right, if she knew that.

If my wife knew that she was going to be in a tragic accident and it could cause harm or death of her unborn child, she could have easily given birth to my son and he would be here right today, only 4½ years old, to say this is wrong, I need to be recognized.

I gave you a picture of my wife when she was about 7½ months along, about 4 weeks prior to that. Not to be a bit sarcastic, but I see two people, and I really do think that in situations you don't harm her to the extent where the Federal crime or the Federal law would come about or any advancement of laws, but you harm this person to the extent of death or brain damage or loss of limbs inside the womb. You have to recognize this as a separate person in the law.

Senator DEWINE. I appreciate all of your testimony very much. I know it has been a difficult morning for you to come in and testify, but your testimony is very important. We are glad you made the sacrifice to come in. We extend to the three of you our deepest sympathy for what you have gone through and what I know you continue to go through. We thank you very much.

Mr. DALY. Thank you.

Senator DEWINE. You have been very helpful.

I would ask now our third panel to come forward. As the third panel comes forward, I will introduce our panel.

Professor Jerry Bradley is a constitutional law expert who teaches at the Notre Dame School of Law. He is here to testify about the constitutionality of the Unborn Victims of Violence Act.

Lieutenant Colonel Davidson is an active-duty Army Judge Advocate currently assigned to the 3rd U.S. Army at Fort McPherson, Georgia. He has served both as a military trial counsel and as a special U.S. attorney. He also has taught military law as an adjunct professor at Arizona State University of Law. He is testifying today as a military law expert. We thank him, as well, for his contribution to the panel.

Ron Weich is a partner in the law firm of Zuckerman, Spaeder, Goldstein, Taylor and Kolker. He has worked as Judiciary Committee counsel for both Senators Specter and Kennedy, and has

also been an attorney with the U.S. Sentencing Commission and an assistant district attorney in New York.

Dr. Juley Fulcher is the Public Policy Director for the National Coalition Against Domestic Violence. She has taught as a visiting professor at the Georgetown University Law Center Domestic Violence Clinic. She also has a Ph.D. in psychology from Johns Hopkins University.

We will start with Professor Bradley, and we have your written testimony, all of you, which we will make a part of the record. You may proceed. We will have the clock on at 5 minutes, but we will be a little lenient if you need to go a little bit beyond that. We appreciate all of you coming in.

Professor Bradley, would you like to start, please?

PANEL CONSISTING OF GERARD V. BRADLEY, PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME, SOUTH BEND, IN; RONALD WEICH, ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR, AND KOLKER, LLP, WASHINGTON, DC; LT. COL. MICHAEL J. DAVIDSON, U.S. ARMY JUDGE ADVOCATE, FORT McPHERSON, GA; AND JULEY FULCHER, PUBLIC POLICY DIRECTOR, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, WASHINGTON, DC

STATEMENT OF GERARD V. BRADLEY

Mr. BRADLEY. Thank you, Senator DeWine. I would like to focus my remarks today on two points, transferred intent and the relation of this Act to the constitutional liberty articulated in *Roe v. Wade*.

Under the rubric of transferred intent, so far the discussion today has really been talking about two different things, and I wish in the first part of my remarks to amplify the distinction which has more recently been drawn by Senator DeWine and Representative Graham. Earlier in the day, we seemed to be talking about, under the rubric of transferred intent, something quite different, and that is the principle of criminal law liability of taking one's victim as one finds him or her.

We mentioned the case of the person with an aneurism who is pushed to the ground. I wish to simply amplify what was said earlier to make a particular point about fortuity or luck in criminal responsibility. Take the same actor with exactly the same intentions doing exactly the same thing to three different people. Let's say they are women, and that act is a strong push on the street.

The first person, steady of foot, may not fall at all. Maybe no one will call 911. Perhaps there is an "excuse me, don't do it again." The second person falls and gets right back up. The third time, exactly the same act, same intention; the person falls and never gets up. Because of an aneurism, the person hit the pavement and died. That third act will constitute some act of homicide, not murder, to be sure, but some form of reckless negligent homicide, perhaps called manslaughter.

Now, this surely does introduce an element of chance or luck into criminal responsibility. To use the language of the Department of Justice witness, you could call it Russian roulette. I think it is just, but it is certainly not a novel concept or a concept novel or first

introduced by this legislation; it is a tried and true principle of the criminal law.

But speaking of the Department of Justice testimony on the matter of transferred intent, I don't think that the Department's testimony, or at least that part of the Department's testimony on page 3 of their submission concerning transferred intent is accurate.

The Department says that the felony murder rule is limited to the subclass of felonies from which a death is reasonably likely to occur. And then the Department's witness goes on to suggest that some of the predicate acts in this Act, Unborn Victims of Violence, are not acts reasonably likely to result in death. I don't know about that last point, but I think that the account of transferred intent, and specifically as applied or found in the felony murder rule, is quite mistaken.

First, I don't think it is true that even according to the Department's testimony, the felonies which are typically grounds for felony murder liability are acts that reasonably likely occur in death. Take burglary, for instance. I don't have the math and I don't have the numbers, but I don't think burglary as such is reasonably likely to kill anybody. If you divided the total number of burglaries reported in the United States in a given year by the number of people killed in burglaries, I don't know what that number would be, but my educated guess is that that number, whatever it is, would be after a decimal point; that is, to the right of a decimal point.

And my guess is that the first number to the right of the decimal would be zero; that is, somewhere less than 1 percent. I don't think that is a definition of "reasonably likely." So therefore it is not typically the case that the felony predicate acts which constitute liability for felony murder are limited to acts which are likely to cause death.

Second, more theoretically, I don't think it is true that felony murder liability has anything to do with acts which are reasonably likely to cause death. I think that the underlying notion of culpability is different, although it may seem related.

I think the traditional idea behind felony murder liability was that anyone who engages in or performs certain bad acts, felonies, exhibits such an indifference to the interests of other people, such a hostility to the common good, that it is right to hold them liable for any consequences that ensue. I think that is pretty much what Representative Graham was saying about this Act. If you hurt a pregnant woman, you are liable for the natural consequences of your act. And I think that account of this Act is perfectly in harmony with traditional notions of responsibility as we find them in the felony murder rule.

Finally, I think the Department's account actually doesn't work at all. If it were true that felony murder liability were predicated upon committing acts reasonably likely to kill or cause death, you wouldn't need a felony murder rule at all because on that view, a person engages in the act which the person knows is reasonably likely to kill. Well, that is manslaughter; that is negligent homicide or reckless homicide. That is not felony murder. So liability would occur under the Department's view, but not liability for felony murder. It would be some kind of criminally negligent homicide.

My second point, *Roe v. Wade*. Some people object to the Act because somehow it is inconsistent with *Roe v. Wade* or its progeny. The view seems to be that there is no significant difference between this Act and a simple, flat declaration by Congress that the unborn are persons. And that, the objection continues, is inconsistent with *Roe*.

Well, the objection would be sound if it were the case that *Roe* or some other Supreme Court case held that the unborn are not persons, but the Supreme Court has never so held. The *Roe* Court said explicitly that it need not resolve the difficult question of when life begins. The Court said in *Roe* the judiciary is not in a position to speculate as to the answer.

What the Court held in this regard was simply this, that Texas, and by extension any other government body, including this Congress, in the Court's words, could not override the rights of the pregnant woman by adopting an answer to the question of when life begins. But this Act makes it as clear as is humanly possible that the rights of pregnant women are preserved. No woman may be held liable under this Act.

This understanding of *Roe* was explicitly confirmed by the Supreme Court in *Webster*, in 1989. The Supreme Court here, reversing a holding of the Eighth Circuit, stated of its own prior decisions, including *Roe*, that it meant those decisions meant only that a State could not justify an abortion regulation otherwise invalid under *Roe* on the grounds that life began at conception. To put that in my own terms, so long as the stated view of public authority that life begins at conception does not interfere with the freedom, the privacy right of women in *Roe*, there is no constitutional difficulty with a State so stating.

Finally, if I may on *Roe*, if I may just for 30 seconds longer, it is important to remember that *Roe* rests entirely upon what the Court called a right of privacy. Its holding is about leaving a pregnant woman unmolested in her privacy to make a decision concerning her and her unborn child. That is not the kind of thing that even sounds like it could command retirement by this Congress from the whole question of when life begins. So long as that privacy is respected, there is nothing in *Roe* to disable the Congress or any other public authority from stating to the rest of the world, stay away from this unborn child. That is what this Act does.

Senator DEWINE. Professor, thank you very much.

[The prepared statement of Mr. Bradley follows:]

PREPARED STATEMENT OF GERARD V. BRADLEY

I am pleased to address the question of the constitutionality of the Unborn Victims of Violence Act of 1999. [Hereafter, "Act".]

The first question about the constitutionality of the Act is not whether it violates a right protected by the Constitution, including the right articulated by the Supreme Court in *Roe v. Wade*. That would be the first, and only interesting, question where a government of general jurisdiction, like our state governments, passed a law like this Act. About half the states have effectively done so, either by separate enactment or by subsuming harm to the unborn within homicide protections of murder or manslaughter. Courts throughout the country have found these laws to be compatible with the right articulated in *Roe*.

Our national government possesses extensive but not indefinite powers, large but not unlimited jurisdiction. Ours is a national government of specific and enumerated powers. It possesses no general power to protect persons, including unborn persons, against private violence. The closest the national government comes to such an au-

thority is the power conferred by the Fourteenth Amendment's guarantee to all "persons" of the "equal protection" of state laws, including state laws against assault and homicide. Upon an appropriate finding of fact by Congress that some identifiable class of persons—say, a racial or ethnic minority, or a particularly vulnerable and politically powerless group, like the infirm or unborn—is, on a widespread basis, unequally exposed to private violence by exclusion from, or lax enforcement of, state homicide laws, direct federal protection against such discrimination would be constitutional.

The first question is whether there is an enumerated power which authorizes the protections accorded the unborn by the Act. With the recent revival of judicially enforceable limits upon Congress's commerce power—see *U.S. v. Lopez*—and the narrow reading of Congress's "enforcement" power under Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, one might expect some debate about the enumerated bases for the Act. Not so. The Act does not engage recent developments, and is subjected to no doubt of its constitutionality because of them. For the Act does not extend Congress's reach; no conduct whatsoever which is presently free of federal regulation will be regulated if the Act becomes law. No conduct which was lawful is to be unlawful; no conduct which was legal is to be illegal. The Act is essentially a punishment enhancement provision.

The Act is perhaps best compared in this regard to the Racketeer Influenced and Corrupt Organizations Act—RICO. RICO, too, relies upon (what it expressly calls) "predicate" offenses—and then lists them, as does the Act—in order to set up what, like the Act, is essentially an enhanced punishment statute. The Act relies upon predicate acts for its constitutional hook, one might say. If there is any question about the constitutionality of its reach, then, it is a question of the constitutionality of the "predicate" offense, and not about this Act.

(There is one question to be taken up concerning the constitutionality of the reach of this Act, where federal authority is predicated entirely upon the identity of an individual attacked. I postpone it until later, for reasons that I believe will be more clear then.)

The Act relies upon established criminal law principles of transferred intent to affix the enhanced penalty to an already criminal act. The basic idea is simple: a bad actor with the requisite malice to, in the language of the bill, "violate [] any of the provisions of law listed in subsection (b)," may be charged with an additional violent offense, without evidence of malice towards or even knowledge of, the baby in utero where the malefactor in fact causes harm to it. This established principle is perhaps classically illustrated in felony murder statutes, where the malice manifested in the commission of a felony is transferred to what may be even an accidentally caused death. So, for example, an arsonist who honestly believes the building he torches is unoccupied is nonetheless indictable for felony murder if, by chance, someone is inside, and is killed.

Nothing in the Act affects, much less unconstitutionally restricts, the mother's right to terminate her pregnancy. (The current expression of the constitutional standard is the "undue burden" test of *Casey v. Planned Parenthood*.) I can scarcely imagine language more adequate to the preservation of the right to abortion than that found in section (c) of the Act. Not only is the mother and all those cooperating with her in securing an abortion completely immunized against all potential liability. No woman may be prosecuted under this Act "with respect to her unborn child." No woman engaged in predicate criminal conduct may be prosecuted for harm to her child, even where she did not intend to abort. So, a woman engaged in a hijacking or assault upon a federal juror or in animal terrorism or in any covered activity and who, as a result (of flight or some mishap) causes harm or death to her own fetus, is beyond prosecution under this Act, even though she may be liable for hijacking or assault upon a juror or animal terrorism. The Act simply does not inhibit the woman's freedom to choose whether to hear a child or not.

In fact, one of the state interests which might be said to be promoted by the Act is precisely the liberty articulated in *Roe*. A woman's freedom to carry a baby to term is inhibited or denied by conduct which results in harm or death to her unborn child.

Someone might object that nevertheless the Act, in its protection of what the Act calls "unborn children" to practically the same extent as other persons is somehow inconsistent with *Roe*, or its progeny. Is there no difference, the objection might hold, between this Act and a flat Congressional declaration that the unborn are persons? And is not that declaration inconsistent with *Roe*, or its progeny.

The answer to this challenge would very likely have to be yes if the Supreme Court in *Roe* or some other case held that the unborn are not persons. But the Court has never so held. The *Roe* court said that it did not "need [to] resolve the difficult question of when life begins" (410 U.S. at 159). The Court there said the "the judici-

ary . . . is not in a position to speculate as to the answer.” (Id.) In no general or broad way, moreover, did the Court hold that the states or the Congress operated under a similar disability. All that the Court held in this regard was that Texas (and thus any other governmental body, including for argument sake, the Congress) “could not override the rights of the pregnant woman” by adopting an answer to the question of when life begins, that she could not be deprived of all freedom of choice by the consequences of legislation regarding the beginning of life. (See 410 U.S. at 162). But this Act does not affect, much less “override,” the rights of any pregnant woman. The *Roe* court opined that the unborn were not to be considered persons in the “whole” sense, an opinion consistent with treating the unborn as persons for some purposes, like inheritance and tort injury, purposes which the *Roe* court itself recognized as legitimate.

This understanding of *Roe* was explicitly confirmed by the Supreme Court in the 1989 *Webster* decision. There the state of Missouri had legislated that the “life of each human being begins at conception,” and the unborn children have protectable interests in life, health, and wellbeing.” The 8th Circuit Court of Appeals seems to have adopted the view of *Roe* states as an “objection” here, that the state had, in light of *Roe*, “impermissibly” adopted a “theory of when life begins.” But the Supreme Court reversed this part of the 8th Circuit holding, stating that its own prior decisions, including *Roe*, meant “only that a state could not justify an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the state’s view.” (Emphasis added). Since this Act is in no way questionable under *Roe* apart from the viewpoint issue, the matter is settled: Congress is as free as was the state of Missouri to conclude, and to enforce outside the parameters of *Roe*, its view that life begins at conception. If there remains something anomalous about the situation, it is an anomaly engendered by *Roe*, and not by this Act.

Now, the postponed question. What if federal jurisdiction is predicated entirely upon the identity of a particular individual, say the President or a cabinet officer or foreign dignitary? Is there a satisfactory basis for enhanced punishment of a violator of, for example, 18 U.S.C. 1751, one who attacks the President and, who as a result of that felonious conduct, injures or kills her unborn child?

The answer must start with the recognition that, strictly speaking, it is only the discharge of federal functions, and not persons just as such, which grounds federal criminal jurisdiction, even in cases like our example. Protection of federal officers and jurors and foreign visitors of a certain rank is justified by virtue of the national interest in protecting the functions which those persons perform, or (to put it differently) the offices whose duties they discharge. These functions are impeded by assaults upon the person of the various officers, as well as by threats to them and even to their families. So it would be constitutional to extend federal protection to the entire families of at least certain federal officers, to insure that nothing distracted them or caused them to be derelict in their duty. It seems a reasonable judgment for Congress to make that there is a distinct, punishable harm to the discharge of federally imposed duties where the unborn child of a protectable person is harmed or destroyed. This would seem exactly the reasoning behind 18 U.S.C. 115, which protects members of the immediate family of a United States official or law enforcement officer against assault, murder and kidnapping.

Senator DEWINE. Mr. Weich.

STATEMENT OF RONALD WEICH

Mr. WEICH. Thank you, Mr. Chairman, for inviting me to testify today. Because I am going to testify in opposition to the bill, I think that it would be inappropriate for me to begin my testimony without acknowledging the very powerful testimony that we heard from the previous panel.

Senator Hatch was very kind at the beginning of the hearing to congratulate me on the birth of my first child recently, and so recent events in my life have made me especially aware of the special bond between parents and children, and made me especially moved by the testimony that we heard. Nothing that I am going to say today is intended to diminish the tragedy of those witnesses or to disrespect them in any respect. I do, however, think that S. 1673 is not the appropriate legislative response to those tragedies.

I am testifying today about the criminal law and sentencing implications of the bill, and I do so based on my knowledge of the Sentencing Guidelines, my experience as a prosecutor, and my research of Federal criminal cases in this area. Based on those experiences, I have concluded that the bill is unnecessary. Current Federal law is sufficient to convict and punish criminals who harm fetuses. The bill adds nothing meaningful to the charging arsenal of prosecutors or to the sentencing options available to judges in these cases.

Let me break that down into two points; first of all, the criminal liability of people who harm fetuses under Federal law, and, second, the sentencing policy currently in Federal law as it pertains to pregnant women.

Federal criminal law has been held to cover the murder of a fetus. I cite in my written testimony *United States v. Spencer*, a case arising from an Indian reservation. And as you know, Senator, most violent crime is prosecuted in State courts. The few Federal cases that there are largely take place on Federal enclaves, such as Indian reservations or military bases.

In *Spencer*, the defendant assaulted and stabbed a pregnant woman. The woman was successfully treated for her life-threatening injuries, but her unborn fetus was born alive and then died. And in that case, the Ninth Circuit upheld his conviction for murder under 18 U.S.C. 1111, the Federal murder statute. I am aware of no contrary holding. Section 1111, the Federal murder statute, has been held to cover the murder of an unborn fetus.

The other case that I located—and I think my research was pretty complete in this regard—the only other Federal case in which this issue has arisen is the *Robbins* case which Lieutenant Colonel Davidson is going to talk about. I won't preempt his testimony, except to say that in that case Airman Robbins was convicted of the crime of killing his unborn child through domestic abuse. His conviction has recently been upheld, and he was prosecuted under the Assimilative Crimes Act.

Senator DeWine, in your statement introducing this bill you seemed to complain about the fact that it was necessary to bootstrap Ohio State law into Federal court in order to reach Airman Robbins' conduct. That bootstrapping is the operation of the Assimilative Crimes Act. When Congress passed that law over a century ago, in 1898, it intended to plug the gaps in Federal law by assimilating State law when there is a violation of State law in Federal territory, in that case a military base. There is nothing insufficient about that, and indeed the *Robbins* case shows that the Assimilative Crimes Act can reach this conduct.

Senator DEWINE. In those States that have the law.

Mr. WEICH. That is correct.

Senator DEWINE. I am familiar with assimilative law because—well, I am. I dealt with it a lot.

Mr. WEICH. Of course, from your previous experience.

I say in my written testimony that I believe that State law is sufficient. This, of course, is not a new concept, the question of fetal injury. Every single State has addressed the issue of criminal liability for fetal injury. Not all of them have passed statutes; many of them have. Some of them have simply developed case law that

makes the murder statute in those States applicable to fetal murder. Many States have determined that separate criminal liability should not apply when the crime injures a non-viable fetus. And by enacting this law, Congress would be, in effect, overruling those judgments of those States.

As to sentencing policy, I cite in my testimony a number of cases in which the Sentencing Guidelines have been held to provide for enhanced punishment for people who injure fetuses. And, of course, that does assume that the individual is prosecuted for the assault on the woman, and that is inherently the case. You cannot injure a fetus without injuring the woman. So providing a sentencing enhancement ensures that the individual is going to be punished for his heinous conduct.

It is my conclusion that the bill is unnecessary, but I go further and suggest that it is detrimental. It is not only unnecessary, but it is a counterproductive addition to the criminal code.

First of all, I argue, Senator, that the bill is poorly drafted in that it doesn't make clear whether the individual needs to be convicted of the predicate offense before being convicted of this offense. The wording of the statute is unclear.

Second, as other witnesses have said, I find the statute to be over-broad as to its definition of bodily injury, its reach to the non-viable fetus, and to the fact that there is no intent requirement.

Finally, I do unfortunately conclude that the bill would have the effect of undermining the central holding in *Roe v. Wade* that a first-trimester fetus, indeed a days-old embryo, is entitled to separate legal status in Federal law. The definition of "unborn child" in this bill says "a member of the species *Homo sapiens* at any stage of development." That is 2 days, and that has profound implications for reproductive freedom in this country.

I don't disagree with Professor Bradley, or at least I don't address his question as to whether the bill is itself unconstitutional under *Roe*. I simply suggest that this bill is part of an effort by the anti-abortion movement—casting, of course, no aspersions on your intentions, but I do feel that this is part of an ongoing battle to humanize fetuses, marginalize women, and demonize abortion providers, and that is a long-term effort to overturn *Roe*.

Senator DEWINE. What do you really think? [Laughter.]

[The prepared statement of Mr. Weich follows:]

PREPARED STATEMENT OF RONALD WEICH

Mr. Chairman, members of the Committee: My name is Ronald Weich and I am a partner in the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, L.L.P. I am pleased to appear before you today to discuss the criminal law and sentencing implications of S. 1673, the "Unborn Victims of Violence Act."

I bring several qualifications to this task. From 1983 to 1987 I worked as an Assistant District Attorney in New York, where I prosecuted a wide array of criminal cases. Thereafter I served as Special Counsel to the United States Sentencing Commission and participated in drafting amendments to the federal sentencing guidelines. I then served on the staff of two Senate committees, including this Committee, where I assisted first Senator Specter and then Senator Kennedy in the development of federal crime and sentencing policy. I am now in private practice, but I continue to serve on the advisory board of the Federal Sentencing Reporter, a scholarly journal in which I have frequently published articles on sentencing law and policy.

I am also a member of the Criminal Justice Council of the American Bar Association.*

After reviewing S. 1673 in light of my experience in the criminal justice system, my knowledge of the federal sentencing guidelines and an examination of relevant case law, I reach one basic conclusion: this bill is unnecessary. Current federal law provides ample authority for the punishment of criminals who hurt fetuses. S. 1673 adds nothing meaningful to the charging arsenal of federal prosecutors or the sentencing options available to federal judges.

Because the bill is unnecessary from a criminal law perspective, I suspect that its purpose, instead, is to score rhetorical points in the ongoing struggle over abortion rights. For reasons I will explain, I strongly object to the use of the federal criminal code as a battlefield in the abortion wars.

I will first describe why the bill is unnecessary in light of current federal law and then explain why I believe it is an unwise addition to federal law.

I. S. 1673 IS UNNECESSARY

Current federal law already provides sufficient authority to punish the conduct that S. 1673 purports to punish.

A. Federal criminal liability

At the outset it should be understood that very few violent crimes are prosecuted in the federal courts. Most street level violent crimes are prosecuted under state law by state prosecutors in state courts. Under our constitutional system, federal criminal jurisdiction only exists if the crime implicates federal civil rights or interstate commerce—which few violent crimes do—or if the crime occurs on a federal enclave such as a federal office building, a military base or an Indian reservation. Thus there are only a handful of federal murder and assault prosecutions each year, and most of those involve Native Americans or soldiers.

S. 1673 targets relatively rare conduct to begin with, namely criminal assault on a fetus. And in the federal context, that rare conduct is even more unusual. I researched federal case law and found only two reported cases in recent years in which the victim of the offense of conviction was a fetus. In one case, *US v. Spencer*, 839 F2d 1341 (9th Cir. 1988), the Native American defendant assaulted a pregnant woman on an Indian reservation, kicking and stabbing her in the abdomen. The woman was successfully treated for life-threatening injuries, but her fetus was born alive and then died. The Ninth Circuit upheld the defendant's conviction under the federal murder statute, 18 U.S.C. § 1111. In the second case, *United States v. Robbins*, 52 M.J. 159 (1999), a soldier assaulted his wife and thereby terminated her pregnancy. The defendant was prosecuted in a military court under the Assimilative Crimes Act and was convicted of manslaughter. His conviction was upheld by the Court of Appeals for the Armed Forces late last year.

Thus, even without the help of S. 1673, these two federal defendants were successfully prosecuted for killing fetuses. Each of the two cases is important for a different reason. *Spencer* holds that the federal murder statute already reaches the killing of a fetus. *Robbins* stands for the proposition that even where federal law does not reach the killing of a fetus, the Assimilative Crimes Act may be employed by federal prosecutors (in that case military prosecutors) to ensure federal criminal liability. Either way, a defendant who kills a fetus gets punished.

I am aware of no contrary holdings. I am aware of no reported or unreported case in which a defendant who has caused serious injury to a fetus has escaped criminal liability because of a gap in federal law. In the rare cases when fetal assaults occurs in a federal enclave, it is very clear that criminal liability may be imposed under current federal law.

The Assimilative Crimes Act, 18 U.S.C. § 13, is especially significant in this regard. When he introduced S. 1673, Senator DeWine complained that in the Robbins case, military prosecutors had to “bootstrap” Ohio criminal law in order to hold the defendant liable in federal court. There is nothing wrong or unusual about that “bootstrapping”—that’s the way Congress intended the Assimilative Crimes Act to work. Congress passed that law to ensure that defendants who commit crimes on a military base or an Indian reservation are held responsible whether or not federal law reaches the conduct. Congress knew that state criminal law is often more devel-

*I wish to make clear that I am not testifying on behalf of the American Bar Association or any other entity with which I am affiliated. Nor am I testifying on behalf of any of my law or lobbying clients. For example, it is a matter of public record that I have represented Planned Parenthood Federation of America (PPFA) with respect to pharmaceutical pricing issues, but I do not represent PPFA at this hearing. The views I express herein are strictly my own.

oped than federal criminal law and so it adopted state criminal law through this process of assimilation.

Reliance on the Assimilative Crimes Act raises the question of whether state law is sufficient. It is. Every state has, either through statute or common law, addressed the question of criminal liability for fetal injury. These state laws and cases are comprehensively collected in an Annotation entitled *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671 (1998). As this A.L.R. Annotation demonstrates, the issue of criminal liability for fetal injury is one that Anglo-American law long ago addressed and resolved in a common sense way.

Of course not all states resolve the issue in the same way. Several states, such as Georgia and Illinois, have enacted feticide statutes, but in other states well-established case law extends the state's murder statute to cover the situation where an assault on a pregnant woman causes the death of a fetus. Many states adhere to the common law doctrine that the fetus must have been viable in order to create separate criminal liability for a fetal assault, and some states require that the fetal assault cause the fetus to be born alive and then die. These common law rules, developed over the course of centuries and incorporated into federal law through the Assimilative Crime Act, ensure appropriate criminal liability for defendants who assault fetuses in federal enclaves.

B. Federal sentencing law

Analytically separate from the question of criminal liability is the question of punishment. Here again, current federal law is sufficient. There is no dispute that causing harm to a fetus during the commission of a federal felony should generally result in enhanced punishment, and courts have uniformly held that such enhancements are available under the current sentencing guidelines.

For example, in both *U.S. v. Peoples*, 1997 U.S. App. LEXIS 27067 (9th Cir. 1997) and *U.S. v. Winzer*, 1998 U.S. App. LEXIS 29640 (9th Cir. 1998), the court held that assaulting a pregnant woman during a bank robbery could lead to a two level enhancement (approximately a 25% increase) under § 2B1.1(b)(3)(A) of the Guidelines relating to physical injury. In *U.S. v. James*, 139 F.3d 709 (9th Cir. 1998), the court held that a pregnant woman may be treated as a "vulnerable victim" under § 3A1.1 of the Guidelines, again leading to a two level sentencing enhancement for the defendant. In *United States v. Manuel*, 1993 U.S. App. LEXIS 14946 (9th Cir. 1993), the court held that the defendant's prior conviction for assaulting his pregnant wife warranted an upward departure from the applicable guideline range for his subsequent assault conviction. And in *United States v. Thomas*, 43 M.J. 550 (US Navy-Marine Corps Ct. of Crim. App. 1995), the military justice system treated the murder victim's pregnancy as an aggravating factor to be considered during the capital sentencing phase of a trial.

It is plainly unnecessary to create a new federal criminal offense for injuring a fetus in the course of a federal crime when existing federal sentencing policy already authorizes stiffer sentences for defendants who cause that harm.

In sum, S. 1673 is unnecessary because federal case law and the federal sentencing guidelines, building on well-established state common law principles, already authorize serious punishment for the harm that the bill seeks to address.

II. S. 1673 IS DETERIMENTAL TO THE CRIMINAL JUSTICE SYSTEM

To say that S. 1673 is unnecessary does not end the inquiry. As members of the Judiciary Committee well know, the federal criminal code is characterized by unfortunate redundancy, and one more criminal law prohibiting what is elsewhere prohibited would barely add to the thicket. But for three reasons, S. 1673 would not only constitute an unnecessary addition to the Code, it would also be an undesirable addition.

First, the bill has been drafted in a structurally unsound manner and will lead to considerable confusion and litigation. To be convicted under 18 U.S.C. § 1841, the new criminal offense created by S. 1673, a defendant must have "engage[d] in conduct that violates" one of the existing federal crimes enumerated in § 1841 (b). But must the defendant be convicted of one of those other offenses before he may be convicted of the separate offense under § 1841? I think that is a sound reading of the statutory text, but the language is unclear. There is already considerable controversy and resource-draining litigation in the federal courts over whether various title 18 provisions constitute separate offenses requiring proof beyond a reasonable doubt or sentencing enhancements requiring only proof by a preponderance of evidence, *see, e.g., Jones v. United States*, 119 S. Ct. 1215 (1999). S. 1673 would add to this confusion if there were ever a prosecution under the new criminal provision it establishes.

This problem could be addressed if, instead of creating a new criminal offense, S. 1673 merely directed the Sentencing Commission to either establish a new sentencing enhancement when the victim of the crime is a pregnant woman, or make clear that a pregnant woman may be considered a “vulnerable victim” under existing § 3A1.1 of the Sentencing Guidelines. As demonstrated above, the generic provision of the guidelines already accomplish this result. But at least a sentencing enhancement bill would not foster confusion and litigation.

Second, S. 1673 is overbroad. To begin with, it incorporated by reference an unduly broad definition of “bodily injury” from 18 U.S.C. § 1365. Whereas the common law rule applied to termination of the pregnancy, S. 1673 would make it a violation of federal law to cause “physical pain” to the fetus or “any other injury to the [fetus], no matter how temporary.” 18 U.S.C. § 1365 (g)(4). That definition may make sense in the consumer safety context from which it derives, but it is bizarre and extreme in the prenatal context of S. 1673. Further, S. 1673 applies to all fetuses, not merely those that are viable, and applies to unintentional as well as intentional conduct. The common law rule, evolved over centuries of Anglo-American jurisprudence, is that an assault causing the death of a viable (or, in the archaic phrase, “quickened”) fetus gives rise to criminal liability. In contrast, the rule in S. 1673 is that an assault unintentionally causing “pain” to a weeks-old fetus gives rise to criminal liability.

Finally, the bill is objectionable because it is a transparently rhetorical exercise in the perennial effort to undermine *Roe v. Wade*, 410 U.S. 113 (1973). since S. 1673 adds nothing meaningful to substantive federal criminal law, its purpose is purely symbolic: to bestow statutory personhood on fetuses, even those that are not viable. that much is clear from section 1841 (d)(1) of the bill which defines “child in utero” to mean “a member of the species homo sapiens, at any stage of development, who is carried in the womb.” (emphasis added). Members of Congress who vote for this bill are voting to repudiate the central holding of *Roe* by treating a first trimester fetus as an independent human being for purposes of federal law.

It is no accident that the bill says nothing about injuries to pregnant women; instead the newly created title is styled “Protection of Unborn Children.” An assault on a fetus cannot occur without an assault on the pregnant woman, but the bill is deliberately framed in terms that ignore the woman. The bill does not create a new federal offense for injuring the woman herself, only for injuring the fetus she carries.

To be sure, there is an explicit exception to the criminal penalties in the bill for “conduct relating to an abortion” but make no mistake—this bill is just one more step in the anti-abortion movement’s methodical, rhetorical strategy to humanize fetuses, marginalize women and demonize abortion providers. The extreme overbreadth of S. 1673 flows directly from that strategy.

The validity of the constitutional protections established in *Roe v. Wade* exceeds the scope of this testimony and is beyond my field of expertise. But as someone who cares about the integrity of the criminal law, I hate to see a skirmish in the abortion wars flare up unnecessarily in the federal criminal code. The criminal justice system is built on ancient principles such a proportionality of punishment and the requirement that a wrongdoer have acted with intent to cause harm (*mens rea*). S. 1673 ignores these principles and thereby corrodes respect for the criminal law as a whole.

Because I believe S. 1673 to be both unnecessary and unwise, I urge the Committee to reject it.

Senator DEWINE. Mr. Davidson.

STATEMENT OF LT. COL. MICHAEL J. DAVIDSON

Lieutenant Colonel DAVIDSON. Sir, first of all, I thank you very much for letting me come today. And I have to preface my remarks by saying that these are all my personal opinions and don’t reflect any position of the Department of the Army or any other Federal agency.

I personally support this bill for a couple of reasons. I am going to focus primarily on military law which is what I am most familiar with. First of all, the Assimilative Crimes Act. The *Robbins* case was the example from your jurisdiction of an airman who beat his wife with such severity that she lost their child.

The whole UCMJ was set up to provide a uniform system of law to our service members. The way it works with the fetal homicide situation is that doesn't exist. Soldiers don't pick where they are assigned. If Airman Robbins had been assigned to Germany, even if both he and his wife were Ohio citizens, the fetal crime part of his misconduct would never have been prosecuted in a military court martial because there is no UCMJ provision for it and there is nothing to assimilate overseas.

Senator DEWINE. Or he would have been in any other State that didn't have that, or overseas.

Lieutenant Colonel DAVIDSON. Yes, sir. About half the States that have no fetal homicide statutes, a member of the service could not be prosecuted for fetal homicide.

The example I gave in my written testimony of how absurd it can get is Fort Campbell, KY. Fort Campbell, KY, actually sits in Kentucky and Tennessee. If a soldier on the Tennessee side assaults a woman and kills the fetus, he can be prosecuted in military court martial for fetal homicide by assimilating Tennessee law. But a few yards into the Kentucky side, the same misconduct by the same parties can't be reached by the military prosecutor. In terms of uniformity, I think this bill would provide a uniform fetal homicide body of law for the military.

To touch base on the transferred intent part of this, military law generally follows transferred intent as it is developed in common law. In military law, there is no requirement that you know the existence of a second victim, and there is no release from your criminal responsibility because the victim is particularly susceptible to harm, in the instance of a pregnant woman. We follow what I guess is called the eggshell, or something like that. You take your victim as you find them. This bill is consistent with existing military law on transferred intent.

One issue that I wanted to address a little bit that I didn't address in my written testimony is the sentencing issue. Unlike the Federal system, we have no sentencing guidelines. So in terms of our existing sentencing scheme, I think this bill would do a lot to address fetal homicide, and the hypothetical I would give you is this. A soldier assaults a woman and kills the fetus. He is charged with some form of assault under article 128.

We have bifurcated trials. In the case-in-chief, the prosecutor wants to bring in the fact that the woman was pregnant. As the situation, I believe, happened to one of our victims, the judge probably would not let that in in the case-in-chief because it is not relevant to one of the elements the prosecution has to prove. It is probably more prejudicial than probative, at least on the guilt part of it. So in that part of it, it would not come in.

And then we would go to the sentencing part, and at that point the prosecutor would say, well, this is directly related to the offense; it is an aggravating circumstance, and under Court Martial Rule 1001 this should be admitted. The defense counsel will then say, again, it is more prejudicial than probative, it is uncharged misconduct—we differ from the Federal Sentencing Guidelines in that respect—and it is light years above what my client either was found guilty of or pled guilty to, the assault charge. Here, you are talking essentially about a second victim, a homicide, even if we

are not going to call it that, and it is infinitely more prejudicial than probative and it will inflame the jury.

And I think a reasonable judge in those circumstances, in a military courtroom, might exclude the evidence that the woman was pregnant. And in that case and under that scenario, the fact that the woman lost her fetus as a result of the assault would never enter the courtroom at all. It would not be a sentencing enhancement. It would not be a consideration for the sentencing body. It would simply not be a factor at all in the court martial.

But by making it a separate crime, and presumably it would be charged as such, obviously the sentencing body would have to know of this and it would be a consideration for the sentencing body when it determines the appropriate sentence for this person. So our sentencing scheme is radically different from the Federal scheme, and while this bill may or may not have an impact on the Federal sentencing because of vulnerable victims and stuff like that, it certainly would have an impact on the way we sentence and it would require the sentencing body to know about the fetal homicide part of the misconduct.

I just want to touch on Senator Feinstein's reference to a sentencing enhancement. There are some provisions where there is a sentencing enhancement for the status of the victim; for example, assault. Regular assault and battery is punished by 6 months in the military. If the victim is under 16, it is punished by 2 years. So to that extent, there would be some enhancement that you could put into something like article 28.

But for our premeditated murder statute, we break it down into four things, but basically all four of them are punishable by life and two of the four are punishable by death if it is capital. In instances where they are non-capital, there is no sentencing enhancement that you could give to that statute. He either gets life or he gets something less than life, and it is all up to the sentencing authority. There is no sentencing enhancement that could be built into some of our statutory punitive articles, such as the premeditated murder statute.

So, in sum, I think this bill would go a long way to improving military justice which, as I pointed out earlier, is a lot different from the Federal system.

Thank you very much.

Senator DEWINE. Thank you very much.

[The prepared statement of Lt. Col. Davidson follows:]

PREPARED STATEMENT OF LT. COL. MICHAEL J. DAVIDSON

I have been asked to comment on the Unborn Victims of Violence Act of 1999 (the Act), S. 1673, particularly as it affects military law. I am an active duty Army Judge Advocate currently assigned to the Third U.S. Army, Fort McPherson, Georgia and have previously served as a both a military trial counsel (prosecutor) and as a Special Assistant U.S. Attorney. I've taught military law as an adjunct professor at Arizona State University School of Law. I possess a B.S. from the U.S. Military Academy, a J.D. from the College of William & Mary, a LL.M. (Military Law) from the Judge Advocate General's School and a LL.M. (Federal Procurement Law) from George Washington University. Earlier I engaged in research in this area while a LL.M. student at George Washington University. The results of this research effort were published as an article entitled "Fetal Crime And Its Cognizability As A Criminal Offense Under Military Law," in the July 1998 edition of *The Army Lawyer*.

Any opinions that I may render are my own personal opinions and do not reflect the position of the Department of the Army or any other federal agency.

With respect to the proposed legislation I would like to make the following points supportive of the Act. 1. The current “born alive” rule, followed by both military and federal courts, is a legal anachronism whose rationale for existence is no longer valid. 2. The Assimilative Crimes Act (ACA), which provides the military a vehicle for prosecuting feticide by using state law, results in an inequitable application of military law to members of the armed forces. This Act will serve to correct that inequity. 3. This legislation does not infringe on a woman’s right to choose. 4. The legal principle of transferred intent, upon which this Act relies, is well-established in military law.

1. THE BORN ALIVE RULE

Both military and federal courts follow the “born alive” rule, which means that before a person can be prosecuted for misconduct that results in the fetus’ death, the fetus had to have survived for at least a short period of time outside the womb. Historically, the definition of what constituted being born alive varied by jurisdiction. For example some states required that the baby survive for a period of time after the umbilical cord was severed. The military rejected that standard in 1954 in *United States v. Gibson*, a case involving an Air Force nurse who strangled her baby shortly after birth. The evidence at trial was unclear as to whether the accused had strangled her child before or after she severed the umbilical cord. The current born alive rule is based on English common law and is believed to have existed since at least 1348. Despite the longevity of this rule the military still struggles to fully develop a definition of that term. See *United States v. Nelson*, 52 M.J. 516 (N.M. Ct. Crim. App. 1999) (review was granted on February 2, 2000).

The rationale for the born alive rule was rooted in the difficulty of proving the cause of a fetus’ death, which was a byproduct of the primitive level of medical knowledge in this area. Indeed, until the late 1800’s a physician could not conclusively establish the existence of a pregnancy until the fetus moved in the womb (the quickening which usually occurred around four months) and the fetus’ health could not be determined until birth.

Continued reliance on the born alive rule is problematic for two reasons. First, modern medicine has advanced to such a point that the basis for the rule simply no longer exists. Presently, medical technology can diagnose the existence of a fetus early in the pregnancy, certainly much earlier than the point of quickening. Additionally, the fetus can be observed through the use of ultrasound and fetoscopy; it can be operated on while still in the womb; and physicians normally can determine the cause of a fetus’ death.

The second reason that continued reliance on this rule of law should be disfavored is that in practice it rewards the successful attacker. An accused (military equivalent of a defendant) who beats a pregnant woman cannot be prosecuted for killing the fetus if it dies before it is born. The death of the fetus goes unpunished. In contrast, the accused who beats the pregnant victim less severely, permitting the fetus to be born alive, may be prosecuted for homicide under existing military and federal homicide statutes if the child dies as a result of the beating. In short, the born alive rule serves to reward the more culpable actor for his heightened state of misconduct.

2. ASSIMILATIVE CRIMES ACT

The Assimilative Crimes Act (ACA), 18 U.S.C. 13, permits prosecution of a member of the armed forces under Article 134, clause 3 (crimes and offenses not capital), UCMJ, for violating a state law within an area of exclusive or concurrent federal jurisdiction (e.g. a military base). The ACA permits use of the penal law of the local state to fill in gaps in military/federal criminal law. Article 134 may not be used to assimilate state law if another provision of the UCMJ or other federal criminal statute has already defined an offense for that specific misconduct. Fetal homicide is not specifically made punishable under any punitive article of the UCMJ or provision of the federal criminal code.

In 1996, for the first time, the military relied on the ACA to assimilate a state feticide law in order to court-martial a member of the armed forces. In *United States v. Robbins*, 52 M.J. 159 (1999), an airman stationed at Wright-Patterson Air Force Base, Ohio, wrapped his fist in a tee shirt and severely beat his wife, who was 34 weeks pregnant. The beating occurred in government housing on base, an area of exclusive federal jurisdiction. This was not the first such incidence of spousal abuse. In addition to breaking his wife’s nose and giving her a black eye (her eye was swollen shut), Robbins punched her with such force that he “ruptured [his wife’s] uterus and tore the placenta from the uterine wall. The unborn baby, who was otherwise healthy, was expelled into the mother’s abdominal cavity and died before birth.” *Id.* at 160.

Eventually Robbins was charged under the UCMJ with two specifications of assault in violation of Article 128; one count of maiming, in violation of Article 124 because Robbins had ruptured his wife's uterus; and with murder and manslaughter under Article 134 through the assimilation of Ohio law. The case was referred to a general court-martial, which is the military's highest form of court-martial. Pursuant to a pretrial agreement (plea bargain), Robbins pled guilty to assault and battery on Mrs. Robbins and intentional infliction of grievous bodily harm on her, in violation of Article 128; and involuntary manslaughter by terminating his wife's pregnancy, in violation of section 2303.04 of the Ohio Revised Code, as assimilated into Article 134, by the Assimilative Crimes Act. The military judge sentenced Robbins to a dishonorable discharge, confinement for eight years, and reduction in rank to the lowest enlisted grade. On appeal, the conviction, and the assimilation of Ohio's fetal homicide law, was reviewed and upheld by both the Air Force Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces.

If enacted, this legislation will have the positive affect of providing a uniform application of feticide law to members of the armed forces. Under existing law, whether or not members of the armed forces may be prosecuted for feticide will depend on where they are stationed. If the military base is located in a state that has a fetal homicide statute (e.g. Ohio), military prosecutors may rely on that law to proceed against the servicemember at court-martial. If that particular state has no such law, or if the servicemember is stationed overseas, no feticide charge will result. Further, even among states with fetal homicide laws, the standard for conviction varies. Some states make feticide a crime if the fetus is viable, others if the fetus is "quick," and still others protect the fetus at the point of fertilization. Even if all states in which military bases are located were to adopt feticide laws, the punishment used by the military would vary by state. Under the ACA, unless the state law is closely related to a punitive article of the UCMJ, the military also assimilates portions of the state's punishment scheme.

To give an example of how absurd this inequitable situation can become I would point to Fort Campbell. This Army base is located in both Kentucky and Tennessee. Tennessee has feticide statutes, but Kentucky does not. Were a soldier to assault a pregnant woman and kill her fetus on the Tennessee side of Fort Campbell he could be prosecuted at a military court-martial, under Article 134, by assimilating Tennessee law. However, if the same misconduct occurred only yards away on the Kentucky side of the base, the military could not prosecute him for committing the identical misconduct against the fetus.

3. A WOMEN'S RIGHT TO CHOOSE

The Act does not infringe on a women's right to choose to terminate the pregnancy and does not conflict with *Roe v. Wade*. This proposed legislation virtually immunizes the mother from prosecution for any harm to the fetus and likewise protects those who are involved with the consensual termination of the pregnancy. The Supreme Court in *Roe* recognized the state's legitimate interest "in protecting potential life" (410 U.S. at 154). This Act not only recognizes the governmental right to protect the fetus from harm—in this case imposed by a third party—but also serves to protect the woman's right to choose to bring her wanted fetus to term.

A number of state courts have examined their fetal homicide laws in light of *Roe* and the results of those examinations support the legality of this Act. In *People v. State*, 872 P.2d 591 (Cal. 1994), the Supreme Court of California opined that the Supreme Court's opinion in *Roe v. Wade* only precluded a state from protecting a nonviable fetus in instances where the interests of the fetus and mother conflict. As noted above, this Act only contemplates applicability when the interests of the government and mother coincide.

Similarly, in *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990), the Supreme Court of Minnesota examined its unborn child homicide law in the wake of *Roe* and its progeny. The court determined that the state possessed a legitimate interest in protecting both the "potentiality of life" at any stage of development and in protecting the woman's right to determine the ultimate outcome of her pregnancy. "The interest of a criminal assailant in terminating a woman's pregnancy does not outweigh the woman's right to continue the pregnancy." *Id.* at 322.

4. TRANSFERRED INTENT

The Act provides that the military accused who engages in certain misconduct against an expectant mother, which results in death or injury to the unborn child, may also be separately prosecuted for the death or injury to the fetus to the same extent as if the death or injury had occurred to the expectant mother. This provision

of the Act is based on the legal principle of “transferred intent,” which is well-established in military law.

The current version of the Manual for Courts-Martial, Part IV, para. 43(c)(2)(b), which discusses Article 118, provides: “When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.” Further, in *United States v. Willis*, 46 M.J. 258 (1997) the U.S. Court of Appeals for the Armed Forces took the position that “where there is . . . an intent to kill and an act designed to bring about the desired killing, the defendant is responsible for all natural and probable consequences of the act, regardless of the intended victim.” The military accused may be convicted of premeditated murder of the second, unintended victim, even in the “absence of any ill-will, animosity, or intent to kill [the second victim].” *United States v. Black*, 11 C.M.R. 57, 59 (C.M.A. 1953).

Under the Act military prosecutors would not be required to prove that the accused knew the victim-mother was pregnant at the time of the accused’s misconduct. This provision of the proposed legislation is consistent with existing law. First, the doctrine of transferred intent does not require knowledge that the second victim was present. Additionally, military law has long followed the related eggshell or thin skull rule; that is, you take your victims as you find them. See *United States v. Eddy*, 26 C.M.R. 718, 725 (A.B.R. 1958).

A state court addressed this same issue in the infanticide context. In *People v. Hall*, 557 N.Y.S.2d 879 (Sup. Ct. App. Div. 1990), the defendant fired two shots at his intended victim, but missed and instead struck a pregnant passerby, Brigette Garrett, who was 28 to 32 weeks pregnant and walking to a nearby restaurant. The fetus was delivered by an emergency caesarean section, but died 36 hours later. In upholding the defendant’s manslaughter conviction the court noted: “It is axiomatic that a perpetrator of illegal conduct takes his victim as he finds them, so it is entirely irrelevant whether the defendant actually knew or should have known that a pregnant woman was in the vicinity and that her fetus could be wounded as a result of his actions.” *Id.* at 885.

In *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990), the defendant challenged his conviction for murdering the unborn child of a woman he had also been convicted of murdering, arguing that “it was unfair to impose on a murderer of a woman an additional penalty for murder of her unborn child when neither the assailant nor the pregnant woman may have been aware of the pregnancy.” *Id.* at 323. The unborn child in question was a 27 to 28 day embryo. Rejecting that argument, the Minnesota Supreme Court found that the doctrine of transferred intent applied. Further, the court pointed out: “The possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.” *Id.*

CONCLUSION

In my personal opinion, I believe this legislation would have a positive impact on military law by providing a uniform feticide law and by eliminating reliance on the out-dated born alive rule. Further, the Act does not interfere with a woman’s right to choose, but instead reinforces both that right and the government’s interest in protecting the potentiality of life. Finally, the Act’s reliance on the principle of transferred intent is consistent with existing military law.”

Senator DEWINE. Ms. Fulcher.

STATEMENT OF JULEY FULCHER

Ms. FULCHER. Good afternoon, Mr. Chairman.

Senator DEWINE. It is afternoon, isn’t it?

Ms. FULCHER. It is.

Senator DEWINE. Thank you.

Ms. Fulcher. As the Public Policy Director of the National Coalition Against Domestic Violence, I would like to thank you for the opportunity to address the concerns of battered women who experience violence during their pregnancies.

The National Coalition Against Domestic Violence is a nationwide network of approximately 2,000 domestic violence shelters,

programs, service providers, and individual members who work on behalf of battered women and their children. And my role here today is to advocate for increased safety of battered women, which in turn will lead to healthier pregnancies and births. Unfortunately, the Unborn Victims of Violence Act does not provide the protection that battered women need to obtain safety.

Historically, one of the major obstacles to eradicating domestic violence from the lives of women has been the unwillingness of the legal system to treat domestic violence as a serious crime. The hard work of many dedicated domestic violence advocates on the front lines has slowly brought about a change in the way we treat the crime of domestic violence.

States began toughening their laws on domestic violence and enforcing the existing laws that would address the issue in the late 1980's, and in 1994, as you are well aware, Congress gave an important boost to this trend by passing the Violence Against Women Act and committing to a Federal investment in prosecuting the crimes and protecting battered women and their children. As a result, we have seen increased criminal prosecutions of domestic violence nationwide both at the Federal and the State level. And it is important that we continue this trend and recognize domestic violence threats, assaults, and murders as the serious crimes that they are.

According to a 1994 report from the Centers for Disease Control and Prevention, at least 6 percent of all pregnant women in this country are battered by the men in their lives. As an attorney representing victims of domestic violence, I have seen the effects of the violence firsthand. In my written testimony, I described a client of mine from several years ago who lost a pregnancy due to domestic violence. There was a history of domestic violence in her case and she had sought assistance of the legal system and service support system several times.

While she was 8 months pregnant, her batterer lifted her up in his arms, held her body horizontal to the ground, and then slammed her body to the floor, causing her to miscarry. And no matter how many times I hear stories like this one, stories like the ones that we heard on the panel before, it never ceases to sicken me what is happening.

I should note that in the case that I just described and in others that I have worked on, it was clear, both by the batterer's words and actions, that his intent was to cause physical and emotional injury to the woman and establish undeniably his power to control her. We as a society are right to want to address this problem and to protect women from such a fate. However, our response to the problem should be one that truly protects the pregnant woman by early intervention before such a tragedy occurs.

The Unborn Victims of Violence Act is not designed to protect women. The goal of the Act is to create a new cause of action on behalf of the unborn. The result is that a crime that is committed against a pregnant woman is no longer about the woman victimized by the violence. Instead, the focus will often be switched to the impact that that crime had on the unborn fetus, once again diverting the attention of the legal system away from domestic violence and other crimes of violence against women.

Moreover, the passage of the Unborn Victims of Violence Act would set a dangerous precedent which could easily lead to statutory changes down the line that could hurt battered women. This bill would, for the first time, federally recognize that the unborn fetus could be the victim of a crime. It would not be a large intellectual leap to expand the notion of unborn fetus as victim to other realms. In fact, some States have already made that leap, and in those States women have been prosecuted and convicted for acts that infringe on State-recognized legal rights of a fetus.

While the Unborn Victims of Violence Act specifically exempts the mother from prosecution for her own actions with respect to the fetus, it is easy to imagine subsequent legislation that would hold her responsible for injury to the fetus, even for violence perpetrated on her by her batterer under a failure to protect theory.

Moreover, a battered woman can be intimidated or pressured by her batterer not to reveal the cause of her miscarriage, and if she is financially or emotionally reliant on her batterer, she may be less likely to seek appropriate medical assistance if doing so could result in the prosecution of her batterer for an offense as serious as murder. The long-term public health implications of such a policy would be devastating for victims of domestic violence and all women.

The harmful potential of this bill is unfortunately balanced by little or no additional protections for battered women and other women victimized by violence. The vast majority of domestic violence threats, assaults, and murders, like other crimes of violence, are prosecuted by the States. While important Federal laws exist to prosecute interstate domestic violence, interstate stalking, and interstate violation of a protection order, these are stop-gap statutes which are appropriately applied in a very small number of cases relative to the incidence of domestic violence nationwide.

In fact, the Federal domestic violence criminal statutes have been called into play only approximately 200 times in the last 5 years. As the Unborn Victims of Violence Act would only apply in Federal cases, the change in the law would do little, if anything, to address the crime of domestic violence in our country or other assaults on pregnant women.

I hope you agree with me that the crime of domestic violence is a horrendous one, not only in terms of the physical impact of the violence but also in terms of its emotional, psychological, social, and economic toll upon its victims. Certainly, there can be no doubt that a pregnancy lost due to domestic violence greatly increases that toll on a battered woman. We at the National Coalition Against Domestic Violence wish to fully recognize and respond to that loss.

However, the more appropriate means of dealing with this problem with respect to battered women is to provide comprehensive health care, safety planning, and domestic violence advocacy for victims. The solution would be to maintain the focus of the criminal prosecution on the intended victim of violence, the battered woman, and make an important, affirmative step toward providing safety for her. If Congress wishes to protect the pregnancy, the way to do that is by protecting the woman.

Thank you.

[The prepared statement of Ms. Fulcher follows:]

PREPARED STATEMENT OF JULEY FULCHER

Good morning Mr. Chairman and Members of the Committee. My name is Juley Fulcher and I am the Public Policy Director of the National Coalition Against Domestic Violence. On behalf of the Coalition, I thank you for the opportunity to address the concerns of battered women who experience violence during their pregnancies. The National Coalition Against Domestic Violence is a nationwide network of approximately 2,000 domestic violence shelters, programs, and individual members working on behalf of battered women and their children. My role here today is to advocate for increased safety for battered women, which in turn will lead to healthier pregnancies and births. Unfortunately, the "Unborn Victims of Violence Act" does NOT provide the protection that battered women need to obtain safety.

Historically, one of the major obstacles to eradicating domestic violence as a serious crime. The hard work of dedicated domestic violence advocates on the front lines has slowly brought about a change in the way we treat the crime of domestic violence. States began toughening laws on domestic violence and enforcing existing laws in the late 1980s. In 1994, Congress gave an important boost to this trend by passing the Violence Against Women Act and committing to a federal investment in protecting battered women and their children. As a result, we have seen increased criminal prosecutions of domestic violence nationwide. It is important that we continue this trend and recognize domestic violence threats, assaults, and murders as the serious crimes that they are.

According to a 1994 report from the Centers for Disease Control and Prevention, at least 6% of all pregnant women in this country are battered by the men in their lives.¹ As an attorney representing victims of domestic violence, I have seen the effects of this violence first hand. Several years ago, a client of mine lost a pregnancy due to domestic violence. There was a history of domestic violence in her case and she had sought assistance several times. While she was 8 months pregnant, her batterer lifted her up in his arms and held her body horizontal to the ground. He then slammed her body to the floor causing her to miscarry. No matter how many stories like this I hear, it never ceases to sicken me. I should note that in this case and others I have worked on, it was clear by the batterer's words and actions that his intent was to cause physical and emotional injury to the women and establish undeniably his power to control her. We, as a society, are right to want to address this problem and protect women from such a fate. However, our response to the problem should be one that truly protects the pregnant woman by early intervention before such a tragedy occurs.

The "Unborn Victims of Violence Act" is not designed to protect women. The goal of the Act is to create a new cause of action on behalf of the unborn. The result is that the crime committed against a pregnant woman is no longer about the woman victimized by violence. Instead the focus often will be switched to the impact of that crime on the unborn fetus, once again diverting the attention of the legal system away from domestic violence or other violence against women.

Moreover, passage of the "Unborn Victims of Violence Act" would set a dangerous precedent which could easily lead to statutory changes that could hurt battered women. This bill would, for the first time, federally recognize that the unborn fetus could be the victim of a crime. It would not be a large intellectual leap to expand the notion of unborn fetus as victim to other realms. In fact, some states have already made that leap and, in those states women have been prosecuted and convicted for acts that infringe on state recognized legal right of a fetus. While the "Unborn Victims of Violence Act" specifically exempts the mother from prosecution for her own actions with respect to the fetus, it is easy to imagine subsequent legislation that would hold her responsible for injury to the fetus, even for the violence perpetrated on her by her batterer under a "failure to protect" theory. Moreover, woman can be intimidated or pressured by her batterer not to reveal the cause of her miscarriage and, if she is fundamentally or emotionally reliant on her batterer, may be less likely to seek appropriate medical assistance if doing so could result in the prosecution of her batterer for an offense as serious as murder. The long-term public health implications of such a policy would be devastating for victims of domestic violence and all women.

The harmful potential of this bill is, unfortunately, balanced by little or no additional protections for battered women and other women victimized by violence. The vast majority of domestic violence threats, assaults and murders—like other crimes of violence—are prosecuted by the states. While important federal laws exist to

¹Centers for Disease Control and Prevention, *The Atlanta Journal* and constitution, 1994.

prosecute interstate domestic violence,² interstate stalking³ and interstate violation of a protection order,⁴ these are stop-gap statutes which are appropriately applied in a very small number of cases relative to the incidence of domestic violence nationwide. In fact, the federal domestic violence criminal statutes have been called into play less than 200 times in the last five years.⁵ As the “Unborn Victims of Violence Act” should only apply in federal cases, the change in the law would do little, if anything, to address the crime of domestic violence in our country or other assaults on pregnant women.

I hope you agree with me that the crime of domestic violence is a horrendous one, not only in terms of the physical impact of the violence, but also in terms of its emotional, psychological, social and economic toll upon its victims. Certainly, there can be no doubt that a pregnancy lost due to domestic violence greatly increases that toll on a batter woman. We at the National Coalition Against Domestic Violence wish to fully recognize and respond to that loss. However, the more appropriate means of dealing with this problem with respect to battered women is to provide comprehensive healthcare safety planning and domestic violence advocacy for victims. This solution would maintain the focus of any criminal prosecution on the intended victim of violence—the battered woman—and make an important affirmative step toward providing safety for her. If Congress wishes to protect the pregnancy, the way to do that is by protecting the woman.

Senator DEWINE. Ms. Fulcher, thank you very much for your testimony. First, let me say in regard to the Violence Against Women Act, this is an Act that I support. I have supported funding of the Act and I look forward to working with the other members of the committee to get it passed.

You have talked about domestic violence very eloquently. This is something that I have been dealing with since the mid-1970’s when I was a county prosecuting attorney. So I certainly understand what you are saying. I understand the need for society to do more. We have made some progress, but we certainly have a long, long way to go. So I agree, I guess, with about 98 percent of your testimony, and I am sure every member of the panel does, no matter what their opinion about this bill is.

I guess where I disagree and where I suspect—I can’t speak for them, but I suspect many of the victims, particularly the ones who have testified here today, probably disagree with you is that this particular Act would divert attention away from the woman. That is not the intention. I don’t think that would take place, I don’t think that would happen. And so I guess I just disagree with you on that particular point, but I appreciate your testimony very much.

This panel has been very helpful, and what I would like to do now—and we are running way over time and I appreciate this panel’s testimony. You are the ones who had to stay here and wait throughout the entire morning, but I would just open it up. If any of you would like to respond to any comments made by any of the other members of the panel, I would be more than happy to hear that at this point.

Professor Bradley, since you went first, I guess you have the opportunity to respond.

² 18 U.S.C. 2261(a).

³ 18 U.S.C. 2261A.

⁴ 18 U.S.C. 2262(a)(1).

⁵ See, *E.G.*, Testimony of Bonnie J. Campbell, Director, Violence Against Women Office, House Judiciary Subcommittee on rime, “Violence Against Women Act Oversight Hearing” (Sep. 29, 1999), also noting that the largest number of these federal domestic violence prosecutions were brought under 18 U.S.C. 922(g)(8)—a statute that is not addressed by the “Unborn Victims of Violence Act.”

Mr. BRADLEY. I have had a long time to think about it, I suppose. Mr. Weich and I were both assistant prosecutors in Manhattan to Robert Morgenthau, who is still the District Attorney of New York County. But I don't have anything like his experience with the Federal system, so I am hesitant to weigh in and disagree with him on one point, but I am going to give it a try.

He said that the additional count that the Act would set up is unnecessary. It may be unnecessary from some perspectives. Whether an additional count is always necessary to deter certain misconduct, who is to say? But I do think, and my own experience with him in a local prosecutor's office suggests to me that wherever there are multiple victims, whether they are multiple homicide victims or multiple victims of assault, four, five, six people, it is just always the case that there is a separate count for each victim.

Even if, in a given case, there is no apparent reason for doing so other than the truth of the matter, which is that there is an additional victim, if you have four, five, six homicide victims, the defendant, if guilty, is going to go to jail for a very, very long time. If you added a seventh victim, if that were the case, they wouldn't go to jail for any longer, nor at least in many cases would it make any difference to the proof or to the likelihood of jury conviction. But it simply seems to me to be the practice, and a proper one, that where, in truth, there are five victims, there are five counts.

Mr. WEICH. May I respond to that?

Senator DEWINE. You certainly can.

Mr. WEICH. Professor Bradley and I were colleagues in the local system, but then I have since gone on to work more in the Federal system. It is actual ly quite a different practice in Federal court, and the most dramatic example of this—and it is one that was raised in the House hearing on the companion bill—is the Oklahoma City bombing.

In that case, there were not 168 counts of murder. The counts were, of course, the destruction of a Federal building, the use of an explosive. Those were Federal counts, and there were Federal counts for the murder of Federal employees because, of course, there were BATF and IRS agents in the Federal building at the time. But the civilians in that building did not have separate counts in the indictment. That is just not the way Federal law works. I understand that there is now a subsequent Oklahoma State prosecution where that is happening, but in the Federal case there were not separate counts.

Your bill, Senator DeWine, would create the anomaly that there would be a count of conviction for the unborn child of one of the pregnant, non-federal employees in the building, but not for the woman herself. And I think that is strong evidence of what Ms. Fulcher was saying, which is that this bill is providing protections for the fetus that in Federal law are not even available for the woman herself. This bill doesn't create a new count, doesn't create new criminal liability for harming the woman during the course of in that case the bombing of a Federal building.

Senator DEWINE. Anyone else? Any other comments?

[No response.]

Senator DEWINE. Well, we appreciate your testimony very much. We intend to take these comments into consideration and we intend to move forward with this legislation. Thank you very much. [Whereupon, at 12:27 p.m., the committee was adjourned.]

A P P E N D I X

PROPOSED LEGISLATION

II

106TH CONGRESS
1ST SESSION

S. 1673

To amend titles 10 and 18, United States Code, to protect unborn victims of violence.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 30, 1999

Mr. DEWINE (for himself, Mr. HUTCHINSON, Mr. VOINOVICH, Mr. NICKLES, Mr. HELMS, and Mr. ENZI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend titles 10 and 18, United States Code, to protect unborn victims of violence.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Unborn Victims of Vio-
5 lence Act of 1999”.

6 **SEC. 2. PROTECTION OF UNBORN CHILDREN.**

7 (a) IN GENERAL.—Title 18, United States Code, is
8 amended by inserting after chapter 90 the following:

1 person shall be punished as provided under section 1111,
2 1112, or 1113 of this title, as applicable, for intentionally
3 killing or attempting to kill a human being, instead of the
4 penalties that would otherwise apply under subparagraph
5 (A).

6 “(D) Notwithstanding any other provision of law, the
7 death penalty shall not be imposed for an offense under
8 this section.

9 “(b) The provisions referred to in subsection (a) are
10 the following:

11 “(1) Sections 36, 37, 43, 111, 112, 113, 114,
12 115, 229, 242, 245, 247, 248, 351, 831, 844(d),
13 844(f), 844(h)(1), 844(i), 924(j), 930, 1111, 1112,
14 1113, 1114, 1116, 1118, 1119, 1120, 1121,
15 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505,
16 1512, 1513, 1751, 1864, 1951, 1952(a)(1)(B),
17 1952(a)(2)(B), 1952(a)(3)(B), 1958, 1959, 1992,
18 2113, 2114, 2116, 2118, 2119, 2191, 2231,
19 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332,
20 2332a, 2332b, 2340A, and 2441 of this title.

21 “(2) Section 408(e) of the Controlled Sub-
22 stances Act of 1970 (21 U.S.C. 848(e)).

23 “(3) Section 202 of the Atomic Energy Act of
24 1954 (42 U.S.C. 2283).

25 “(c) Subsection (a) does not permit prosecution—

1 “(1) for conduct relating to an abortion for
2 which the consent of the pregnant woman has been
3 obtained or for which such consent is implied by law
4 in a medical emergency;

5 “(2) for conduct relating to any medical treat-
6 ment of the pregnant woman or her unborn child; or

7 “(3) of any woman with respect to her unborn
8 child.

9 “(d) In this section—

10 “(1) the terms ‘child in utero’ and ‘child, who
11 is in utero’ mean a member of the species homo
12 sapiens, at any stage of development, who is carried
13 in the womb; and

14 “(2) the term ‘unborn child’ means a child in
15 utero.”.

16 (b) CLERICAL AMENDMENT.—The table of chapters
17 for part I of title 18, United States Code, is amended by
18 inserting after the item relating to chapter 90 the fol-
19 lowing:

“90A. Causing death of or bodily injury to unborn child 1841”.

20 **SEC. 3. MILITARY JUSTICE SYSTEM.**

21 (a) PROTECTION OF UNBORN CHILDREN.—Sub-
22 chapter X of chapter 47 of title 10, United States Code
23 (the Uniform Code of Military Justice), is amended by in-
24 serting after section 919 (article 119) the following:

1 **“§919a. Art. 119a. Causing death of or bodily injury**
2 **to unborn child**

3 “(a)(1) Any person subject to this chapter who en-
4 gages in conduct that violates any of the provisions of law
5 listed in subsection (b) and thereby causes the death of,
6 or bodily injury (as defined in section 1365 of title 18)
7 to, a child, who is in utero at the time the conduct takes
8 place, is guilty of a separate offense under this section.

9 “(2)(A) Except as otherwise provided in this para-
10 graph, the punishment for that separate offense is the
11 same as the punishment for that conduct under this chap-
12 ter had that injury or death occurred to the unborn child’s
13 mother.

14 “(B) An offense under this section does not require
15 proof that—

16 “(i) the person engaging in the conduct had
17 knowledge or should have had knowledge that the
18 victim of the underlying offense was pregnant; or

19 “(ii) the defendant intended to cause the death
20 of, or bodily injury to, the unborn child.

21 “(C) If the person engaging in the conduct thereby
22 intentionally kills or attempts to kill the unborn child, that
23 person shall be punished as provided under section 918,
24 919, or 880 of this title (article 118, 119, or 80), as appli-
25 cable, for intentionally killing or attempting to kill a

1 human being, instead of the penalties that would otherwise
2 apply under subparagraph (A).

3 “(D) Notwithstanding any other provision of law, the
4 death penalty shall not be imposed for an offense under
5 this section.

6 “(b) The provisions referred to in subsection (a) are
7 sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926,
8 and 928 of this title (articles 111, 118, 119(a), 119(b)(2),
9 120(a), 122, 124, 126, and 128).

10 “(c) Subsection (a) does not permit prosecution—

11 “(1) for conduct relating to an abortion for
12 which the consent of the pregnant woman has been
13 obtained or for which such consent is implied by law
14 in a medical emergency;

15 “(2) for conduct relating to any medical treat-
16 ment of the pregnant woman or her unborn child; or

17 “(3) of any woman with respect to her unborn
18 child.

19 “(d) In this section—

20 “(1) the terms ‘child in utero’ and ‘child, who
21 is in utero’ mean a member of the species homo
22 sapiens, at any stage of development, who is carried
23 in the womb; and

24 “(2) the term ‘unborn child’ means a child in
25 utero.”.

1 (b) CLERICAL AMENDMENT.—The table of sections
2 at the beginning of such subchapter is amended by insert-
3 ing after the item relating to section 919 the following:

“919a. 119a. Causing death of or bodily injury to unborn child.”.

○

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF HON. BOB SMITH, A U.S. SENATOR FROM THE STATE OF
NEW HAMPSHIRE

This bill establishes that if an unborn child is injured or killed during a crime that is punishable under Federal law, the assailant may be also charged with a second offense on behalf of the second victim, the unborn child.

The companion bill to S. 1673, H.R. 2436, passed with a bipartisan vote (56 Democrats) of 254-172. I am proud to support this bill, and I am confident that S. 1673 will garner the same bi-partisan support when it comes to a vote.

Twenty-four states already have laws that provide criminal penalties for killing unborn children during at least some part of the prenatal development time period. We should fill the gap in Federal law by providing additional punishment for criminals who, while perpetrating a Federal crime, injure or kill another innocent victim—the unborn.

Those who oppose this bill are opposed to the very notion of granting any form of personhood to the unborn child. However, our nation already, in many cases, views the unborn as having separate interests and separate rights from its mother. For instance, we already have warnings on cigarette and alcohol labels about the harmful effects of those products or unborn children. Our medical profession already treats the unborn as patients, especially as technology increases fetal viability. Our legal community already grants status and protection to the unborn, particularly in child custody cases and protective orders, and very often treats fetuses as individuals.

In addition, the Supreme Court has ruled that the government has an “important legitimate interest in protecting the potentiality of human life,” and also that the government has legitimate interests in protecting “the life of the fetus that may become a child.”

Under the Freedom of Access to Clinic Entrances Act (FACE), an abortion protester who interferes with a pregnant woman by harming her physically, and who subsequently kills the unborn child, can be punished with life imprisonment—the same punishment as if the protester has killed the woman herself.

Obviously, our country has already personified the unborn child in many respects, and made it deserving of cultural, political and legal protection. It is only logical that we extend this protection under Federal law.

Nevertheless, this bill falls short in one crucial aspect: it does not extend legal protection to unborn children who are “unwanted.” These “undesirables” are left to the devices of the abortionist’s scalpel. In other words, all the forementioned rights and privileges that have been extended to unborn children from the states, from prestigious professions, from Federal statutes, agencies and courts, do not apply if the unborn child is not wanted. Where one late-term unborn child would receive all the legal and medical protection due to any American, another would lose its life at the hands of an abortionist, all because the latter child was deemed to be inconvenient or imperfect and therefore unworthy of life. This arbitrary and unjust standard goes against the ideals that we should strive to uphold as Americans and as citizens of a civilized society. It is time that we end this schizophrenic and capricious standard and extend the legal right to life to the most innocent and defenseless of us all, the unborn.

PREPARED STATEMENT OF HON. TERRY DEMPSEY, JUDGE OF THE FIFTH DISTRICT OF
MINNESOTA

My name is Terry Dempsey, and I want to thank you all for allowing me to appear before this committee to address issues that I feel are important.

As a member of the Minnesota House of Representatives, a similar issue came to my attention, and I felt strongly that it merited a legislative response. What gave

rise to the issue was a tragic automobile accident that involved an expectant mother who was operating her vehicle on a normal driving day. Sometime before she could complete her trip, her automobile was involved in a collision. Her car and one being operated by a drunk driver collided. Although the mother wasn't seriously injured, the collision did result in the death of her unborn child. The mother was beyond her sixth month of pregnancy.

Our statutes at the time did not provide for any penalty for someone causing such an injury—in this case the death of the fetus. There was a strong outpouring of sentiment that such conduct should be punishable under our criminal law. Albeit, that civil liability may result, with insurance coverages and other factors coming into play, that did not seem to be an adequate remedy.

Minnesota Statutes were amended by a bill I authored. At the outset there was some discussion that the motives for the legislation was something other than to attach criminal sanctions for such conduct, but the bill passed and became law. There was not a lot of interest in the new law until a case was brought in District Court in northern Minnesota. That charge seemed to generate some questions about my motive and those who voted for the legislation. Was it really wrongful conduct warranting criminal prosecution, or was it a ruse to somehow confer upon the unborn a standing that might lead to other legislation or even court decisions of a similar nature. It even attracted one major news network to come to Minnesota to do a short news story about it on network TV. I was asked in an interview about why the legislation was needed; others were similarly asked the same question. That was a number of years ago. The law remains intact today. Those of us who supported the legislation, and now even some of those who at one time had reservations about the precedent that it might set, agree it wasn't an attempt to erode the *Roe v. Wade* decision of a person's right to an abortion, but was the right thing to do.

As a lawyer and a judge, I have not seen any attempt to use the law for any purpose, except to punish those who break its provisions. Is it an absolute deterrent to the crimes they address? I can't say. But I can say with some degree of surety that for those who are affected by the conduct which this Minnesota statute addressed, agree that it closed a glitch in the law that had existed by making such conduct a criminal offense. To defeat the proposal before you based on some fear that this might be a slippery slope and used to "confer" or "attribute" rights to the unborn is contrary to the experience in Minnesota. Our statutes do not deal with the right of abortion, nor do they conflict with the U.S. Supreme Court decisions on abortion. In truth and in fact, the legislation in Minnesota addresses the conduct of a person as it affects the lives of others and hasn't been expanded beyond that by our courts, nor have I seen any attempt that it be used for other purposes.

As you consider the proposal before you, I hope you will look to the Minnesota experience as a precedent. The legislation is similar, and the reasons for passage are evident. The reason for opposing this legislation I feel cannot be on the merits of the proposal, but rather a feeling that there might be some side effects that some may attempt to use this legislation for purpose beyond the sanctions attached to a criminal act. I doubt that such attempts would be successful based upon what has occurred in Minnesota. There is clearly a wrong to be addressed by the bill you are considering.

That you again for letter me discuss my feelings and experiences with you.

PREPARED STATEMENT OF PETER J. RUBIN, VISITING ASSOCIATE PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER*

I have been asked by members of the Committee to review and comment upon S. 1673, which would create a separate federal criminal offense where criminal conduct prohibited under a list of over sixty federal statutes, in the words of the proposed law "causes the death of, or bodily injury . . . to, a child, who is in utero." I am honored to have the opportunity to convey my views to the Committee.

Where an act of violence against a pregnant woman results in a miscarriage, that act of violence has wrought a distinct and unique harm in addition to the harm it would have done had the woman not been pregnant. Similarly, injury to a baby that may result from unlawful violence perpetrated upon its mother when it was a fetus in utero is something from which government may properly seek to protect the woman and the child.

*My testimony is provided in the public interest; I do not speak on behalf of any client or organization.

Consequently, although many states adhere to the traditional rule that the criminal law reaches only conduct against a person already born alive, some states have enacted laws that penalize conduct against a person already born alive, some states have enacted laws that penalize conduct that may kill or, in some cases, injure, a fetus in utero. One example is North Carolina's state statute which provides that "A person who in the commission of a felony causes injury to a woman, knowing the woman to be pregnant, which injury results in a miscarriage or stillbirth by the woman is guilty of a felony that is one class higher than the felony committed." N.C. Gen. State. § 14-18.2.

If the members of Congress conclude that causing injury in this way during the commission of a federal crime warrants additional punishment, it, too, could adopt such a provision. Indeed, it seems as though this is one area on which both sides of the debate about abortion might be able to find common ground in supporting a properly worded statute that might give additional protection to women and their families from this unique class of injury.

As currently drafted, however, the proposed statute has several distinct problems, some of which could give rise to constitutional objection, and others of which would simply divide Americans, creating an unnecessary conflict with America's legal and constitutional tradition.

In both form and substance the proposed law differs critically from many state laws. As written, the proposed law uses the phrase "child, who is in utero at the time the conduct takes place" to describe the fetus. This is not the ordinary way statutes refer to fetuses in utero. Indeed, the proposed law appears to be unique in its use of this formulation. *The use of this language will likely subject S. 1673 to legal challenge, and will likely render the proposed law ineffective in preventing and punishing acts that harm or kill fetuses being carried by pregnant women.*

Because it uses this formulation, the proposed law would likely result more in useless litigation about the statute's meaning than in the prevention and punishment of conduct that results in fetal injury or death. Its use of the phrase "child, who is in utero" may give a defendant an argument that the statute is ambiguous, and that he lacked the notice of what acts are criminal that is required by the Due Process Clause of the Fifth Amendment.¹ Does it mean the statute applies only to the injury or death of a "child," that is one who is subsequently born, but who was injured in utero? This is a reasonable reading of the statute: traditionally in the United States, legal interests of the unborn have ordinarily been contingent upon subsequent live birth.² Does the language of the proposed statute refer instead to a fetus past the point of viability? Does it refer to a single-cell fertilized ova that has not yet implanted in the uterine wall? The statute does not tell us.

Even if the law is not held inapplicable because of unconstitutionally vagueness, the Supreme Court has articulated a doctrine known as the doctrine of "lenity."³ Rooted in part in separation of powers concerns, this doctrine means that an ambiguous federal criminal statute must be construed by courts in the way most favorable to the defendant, lest an individual be criminally punished for conduct that Congress did not intend to criminalize.⁴ At best, the phrase "child, who is in utero" is ambiguous here, and a defendant is likely to be able to avoid prosecution for whatever conduct it is that the drafters of this law intend to criminalize.

There is a deeper problem with the proposed statute as well. In addressing violence that may cause injury or death of a fetus, the bill treats the fetus solely as a separate victim of certain federal crimes. This approach is different from that taken by some states that have enacted criminal laws addressing fetal injury or death in that it fails to focus at all on the woman who is the victim of the violence that may injure or kill the fetus.

It would be far easier to reach common ground with an approach that takes account of place of the pregnant woman when acts of violence against her lead to fetal injury or death. Indeed, the approach taken by the current statute may lead to some unintended results, and is not consistent with the treatment of the fetus in the American legal tradition. The statute does not just increase the penalty for unlawful violence against a pregnant woman that results in the death of or injury to a fetus. Rather it includes fetuses within the universe of persons who may be protected from injury or death resulting from violations of other federal criminal laws.

Further, the statute does not draw any distinctions based on gestational age. An action that results in a miscarriage, at literally any stage of pregnancy, is to be treated as though it had resulted in the death of a grown woman, the woman who

¹ See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966).

² See, e.g., *Roe v. Wade*, 410 U.S. 113, 161 (1973) (describing legal treatment of the unborn).

³ See, e.g., *United States v. Bass*, 404 U.S. 336, 347 (1971).

⁴ See id. at 347-349.

suffered the miscarriage, subjecting the perpetrator to penalties up to life imprisonment. *Nor is the law limited to perpetrators who knew, or even to those who should have known, that the woman they injured was pregnant.* Indeed, a defendant may be imprisoned for life under this law for unintentionally causing a woman to miscarry even if that woman herself was not aware she was pregnant! The provisions of the bill with regard to intent thus depart from the traditional rule that criminal punishment should correspond to the knowledge and intent of the defendant.

Many state laws address fetal injury and death only in certain circumstances, and, reflecting the unique nature of the developing fetus, many provide some penalty that is different from the penalty that would have applied had the defendant killed or injured a person who was already born. They tend also to take account of the fetus's stage of development. Thus, for example, Mississippi law punishes as manslaughter violence to a pregnant woman that results in the death of a "quick" fetus: "The willful killing of an unborn quick child, by an injury to the mother of such child, which would be murder if it resulted in the death of the mother, shall be manslaughter." Miss. Code. Ann. §97-3-37.

State feticide laws often do not treat even the intentional killing of a fetus through violence perpetrated upon the pregnant woman as murder equivalent to the murder of a person who has been born. Some, like North Carolina, enhance the penalty for the underlying criminal conduct. Others, like Mississippi, treat even intentional feticide only as manslaughter.

The proposed law by contrast treats violence that causes injury or death to a fetus as equivalent to violence causing injury or death to a person who has been born. The bill says that whenever causing death or injury to a person in violation of a listed law would subject an individual to a particular punishment, he shall be subject to the same punishment if he causes death or injury to a fetus. This is true regardless of fetal development.

Whatever its rhetorical force, the proposed law would lead to some unusual, and probably unintended, results. To give just one example, under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §248, one of the statutes listed in S. 1673, if an individual who is engaged in obstructing access to an abortion clinic knocks a pregnant woman to the ground during a demonstration, he is liable to imprisonment for up to one year. If he causes her "bodily injury" when he knocks her down, he would be subject under FACE to a ten-year term of imprisonment. Under the proposed law, however, if the woman miscarried as a result of being knocked down, the defendant would be subject to life imprisonment, the same as if his action had caused the death of a woman herself.

In addition to being far more practical, it would be far easier to reach common ground on this issue with adoption of a statute similar to those state statutes providing for enhanced punishments that I have described. For in addition to the practical consequences, the use of a statutory framework that seeks to achieve its result through treating all fetuses at all stages of development as persons distinct from the women who carry them unnecessarily places federal statutory law on the path toward turning the pregnant woman into the adversary rather than the protector of the fetus she carries. For although this law contains exceptions for abortion, for medical treatment of the woman or the fetus, and for the woman's own conduct—exceptions that are both wise and constitutionally required—if the fetus were truly a "person," there would be no principled reason to include such exceptions. Yet of course a law that did not contain them would be shocking to most Americans and both obviously and facially unconstitutional.⁵

Finally, then, in failing to take account of the woman, the proposed statute also sets federal law apart from the American legal and constitutional tradition with respect to the treatment of the fetus. As the Supreme Court has described, "the unborn have never been recognized in the law as persons in the whole sense."⁶ At

⁵I should not that, *as currently drafted, the exception for abortion contained in the proposed statute is constitutionally inadequate.* The proposed law provides that prosecution is not permitted "for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency." This exception—which covers implied consent only in the context of medical emergency—does not cover abortions that have been ordered by courts because they are in the best interests of women, including minors, who are not capable of consenting on their own behalf. Such abortions are sometimes lawfully ordered. Indeed, the Constitution requires pregnant minors to be able to avoid parental involvement in their abortion decisions by obtaining a judicial determination either that they are mature enough themselves to consent to the abortion, or that, if they are not mature enough to consent, the abortion is in their best interests. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 441 n. 31 (1983); *Bellotti v. Baird* (Bellotti II), 443 U.S. 622, 643-644 (1979) (plurality opinion of Powell, J.).

⁶*Roe v. Wade*, 410 U.S.C. 113, 162 (1973).

common law, the destruction of a fetus in utero was not recognized as homicide unless the victim was born alive.⁷ And, of course, the Supreme Court has held that fetuses are not persons within the meaning of the Fourteenth Amendment.⁸ This is a position with which even as staunch as opponent of *Roe v. Wade* as Justice Antonin Scalia agrees.⁹

In addition, therefore, to the practical and political considerations that counsel in favor of an alternative approach, the proposed law would also unnecessarily set federal statutory law on a conceptual collision course with the Supreme Court's abortion decisions. Whatever one may think of those decisions, all unnecessary conflict about them would not contribute to the important work of healing where possible the country's division over abortion.



⁷See *Commonwealth v. Cass*, 467 N.E. 2d 1324, 1328 (Mass. 1984) (describing the common law).

⁸*Roe*, 410 U.S. at 157.

⁹See *Webster v. Reproductive Health Services*, 492 U.S. 490, 535 (Scalia, J., concurring in part and concurring in judgment) (stating that the legality of a abortion is "a political issue" that should be decided by the states, a position dependent upon an implicit conclusion that fetuses are not "persons" within the meaning of the Fourteenth Amendment).